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## Torts

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# TORTS\*

WALTER H. BECKHAM, JR.\*\* AND MARGARITA ESQUIROZ\*\*\*

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## I. NEGLIGENCE

### A. *Invitees and Licensees*

In an action by a social guest for injuries sustained on his host's property, a showing by the guest that the host should have known of the danger will not suffice.<sup>1</sup> In *Britz v. LeBase*,<sup>2</sup> the Supreme Court of Florida held that the plaintiff social guest must produce some evidence that the defendant host actually knew of the condition. In addition, the court ruled that constructive possession of an area adjacent to, but not actually on, the defendant's property will not be sufficient to render the host responsible for the social guest's claim. The court, upon concluding that the danger must exist on the defendant's premises, expressly "decline[d] to extend a homeowner's liability to injuries caused by unknown dangerous conditions on adjacent property."<sup>3</sup>

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\* The decisions surveyed in this article appear in volumes 250 through 280 of the Southern Reporter, Second Series.

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1. *Britz v. LeBase*, 258 So. 2d 811 (Fla. 1971), *rev'g* 240 So. 2d 819 (Fla. 4th Dist. 1970) [hereinafter referred to as *LeBase*].

2. *Id.*

3. *Id.* at 813.

Visiting with her father in the defendants' home, the minor plaintiff in *LeBase* lost an eye while playing hide-and-seek with the defendants' children. In an effort to find a good hiding place, the child ran into a yucca plant in a dark area. Known as a Spanish bayonet plant, the yucca plant had sharp points at the end of long stems and was located on an adjacent lot, approximately six to eight feet off the defendants' yard line.<sup>4</sup> While it appeared that the minor plaintiff and her father had knowledge of the existence of these dangerous plants, the defendant-wife testified that she and her husband were new to the area, and therefore, were unfamiliar with these plants. The Supreme Court of Florida, by reinstating the trial court's directed verdict for the defendants, reiterated the elements required to impose liability on a host for his social guest's injuries:<sup>5</sup> (1) the host must have *actual*, as opposed to constructive, knowledge of the dangerous condition; (2) the host must realize that the condition presents an unreasonable risk of harm to his guest; and (3) the host must be under the reasonable belief that his guest will not realize the risk or discover the condition.<sup>6</sup>

During the survey period, the Supreme Court of Florida decided a case which is a major inroad in the principles applicable to the duty owed by a landowner to persons injured on his premises. In *Post v. Lunney*,<sup>7</sup> the court broadened the scope of the invitee category, thus making a corresponding expansion of the landowner's liability to those coming under the invitee concept. In *Lunney*, the supreme court was faced with the question of adopting either the "invitation test,"<sup>8</sup> or the "economic benefit test," the latter constituting the law in Florida at the time of *Lunney's* adjudication.<sup>9</sup> In rejecting the economic benefit test, the court agreed with the District Court of Appeal, Fourth District, that the "invitation test," encompassing both the "public" as well as the business invitee, is preferable over the narrow and exclusive "mutual economic benefit test." Thus, the court announced that a person is an invitee if he falls under one of two categories:

(1) An invitee is either a public invitee or a business visitor.

4. The court concluded that *LeBase* was not an attractive nuisance case because the element of "attraction" was lacking.

5. These elements were first set forth in *Goldberg v. Straus*, 45 So. 2d 883 (Fla. 1950).

6. *Britz v. LeBase*, 258 So. 2d 811, 813 (Fla. 1971).

7. 261 So. 2d 146 (Fla. 1972), *aff'g* 248 So. 2d 504 (Fla. 4th Dist. 1971) [hereinafter referred to as *Lunney*].

8. In essence, this test categorizes as invitees those persons coming to the property simply for the purpose for which it is held open to the public. No business benefit need accrue to either party. *RESTATEMENT (SECOND) OF TORTS* § 332 (1965).

9. *McNulty v. Hurley*, 97 So. 2d 185 (Fla. 1957), wherein the determinative question was stated as:

Whether the injured person . . . had present business relations with the owner of the premises which would render his presence of mutual aid to both. . . . In the absence of some relation which inures to the mutual benefit of the two, or to that of the owner, no invitation can be implied, and the injured person must be regarded as a mere licensee.

*Id.* at 188 (emphasis deleted).

- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.<sup>10</sup>

In *Lunney*, the plaintiff was injured while taking a garden tour of the defendant's home for which she had paid five dollars to a garden club. The defendant, however, received no remuneration from the event. The plaintiff tripped over a piece of vinyl placed over a valuable oriental rug to protect it. As a result, she sustained a hip fracture. The court reasoned that under the "invitation test," the plaintiff had clearly attained the status of an invitee; she had been invited to enter the defendant's estate for the purpose for which it was held open to the public, namely, a garden tour of the estate. The court, however, did caution that "[t]he licensee status of the social guest in the home remains unchanged as does the status of the trespasser and the respective standards of care applicable to each."<sup>11</sup>

In spite of the clear wording of the *Lunney* decision with respect to the unchanged status of the social guest, the Supreme Court of Florida in *Wood v. Camp*<sup>12</sup> included within the scope of the invitee category the so-called "invited social guest," thus accomplishing a further enlargement of the invitee concept. In *Camp*, the defendant had built a bomb shelter in his front yard, installing into it a gas line. The deceased minor, a playmate of the defendant's son and a regular visitor, was injured when the valve to the gas lamp caused an explosion in the shelter. The evidence showed that there was no shut-off valve and that the valve in question was partially open.<sup>13</sup> The child died five days later. In reversing summary judgment for the defendant, the District Court of Appeal, Second District, attempted to dispense with all categories which define the duty of care owed to invitees, licensees, and trespassers by a landowner. The court instead adopted the test of "reasonableness under the circumstances in every situation."<sup>14</sup> However, deeming the test too vague and unreasonable, the Supreme Court of Florida curtailed the Second District's attempt and

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10. *Post v. Lunney*, 261 So. 146, 148 (Fla. 1972), quoting from RESTATEMENT (SECOND) OF TORTS § 332 (1965) (emphasis deleted).

11. *Post v. Lunney*, 261 So. 2d 146, 149 (Fla. 1972).

12. 284 So. 2d 691 (Fla. 1973), *aff'g on other grounds sub nom.* *Camp v. Gulf Counties Gas Co.*, 265 So. 2d 730 (Fla. 2d Dist. 1972) [hereinafter referred to as *Camp*].

13. There was some evidence that the installation of a shut-off valve is necessary for safety purposes. *Camp v. Gulf Counties Gas Co.*, 265 So. 2d 730, 731 (1972).

14. *Id.* The court quoted from the dissenting opinion in *Kermarec v. Compagnie Generale Transatlantique*, 245 F.2d 175 (2d Cir. 1957):

Any discussion of the categories of invitee, licensee, and trespasser would be quite inadequate without the observation that these distinctions have been more and more obscured during the last century as courts have moved toward imposing on owners and occupiers a single duty of reasonable care in all circumstances.

*Camp v. Gulf Counties Gas Co.*, 265 So. 2d 730, 731 (Fla. 2d Dist. 1972).

in its stead created a distinction between the "uninvited" and the expressly or impliedly "invited" guest, announcing:

[W]e . . . hold that the class of invitees now under the present definition in *Lunney* as entitled to reasonable care is expanded to include those who are "licensees by invitation" of the property owner, either by express or reasonably implied invitation. We thereby eliminate the distinction between commercial (business or public) visitors and social guests upon the premises, applying to both the single standard of reasonable care under the circumstances. In doing so, we continue the category of licensees who are *uninvited*, that is, persons who choose to come upon the premises solely for their own convenience without invitation either expressed or reasonably implied under the circumstances.<sup>15</sup>

The court then enumerated the factors which should be considered in determining what will constitute "reasonable care in the circumstances:" (1) whether the presence of the injured person on the premises was reasonably to be expected by the owner; (2) the injured person's purpose in coming upon the premises; and (3) the physical location of the injured party within the property at the time of the injury."<sup>16</sup>

In adopting the decision of the District Court of Appeal, Fourth

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15. *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973) (emphasis in original). In so holding, the court may have restricted the category of licensees to such an extent that it may have dispensed with it for all practical purposes. It is somewhat difficult to visualize who will remain a licensee under the test announced in *Camp*. The *Camp* opinion gave the example of the "invited" tenant's guest who deviates from the "common corridor" on his way to his host's room. Out of curiosity, he proceeds instead to the service area, where he falls over a stack of tables. The court stated that since the hotel owner had no reason to anticipate his tenant's guests in the hotel service area, the owner would owe such "uninvited" guest merely the historical duty owed to a licensee. However, a person who goes, *without the owner's consent*, to an area of the property where the owner would not expect him to be (that is, off of the so-called area of invitation), is perhaps more appropriately labeled a trespasser. The licensee category is therefore reduced to nothing more than a theoretical concept, with little or no practical application. In his discussion of invitees, Prosser lends support to this analysis:

If the customer is invited or encouraged to go to an unusual part of the premises, such as behind a counter or into a storeroom, for the purpose which has brought him, he remains an invitee; but if he goes without such encouragement and solely on his own initiative, he is only a licensee if there is consent, or a trespasser if there is not.

W. PROSSER, *LAW OF TORTS* § 61, at 392 (4th ed. 1971). In the example given by the *Camp* court, there was clearly neither consent nor invitation extended by the owner to the tenant's guest to explore the service area. Thus, the guest would become a trespasser, not an "uninvited" social guest. In fact, the *Camp* court itself showed awareness of this inconsistency when it stated:

We realize this very limited category [of uninvited licensees] seems to overlap with the trespasser but there can be narrow distinctions and we justify this narrow class of "uninvited licensee" on such basis.

*Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973). But the court failed to clarify or define the scope of this "narrow distinction" of uninvited licensees. Thus, there still remains the question of whether the uninvited licensee is, in fact, truly a trespasser and, as such, merely is owed the historical duty of refraining from wilful and wanton conduct. Likewise, although the court attempted to reconcile its holdings in *Camp* and *LeBase*, it would seem that the two rulings remain inconsistent.

16. *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973).

District, in *Billen v. Hix*<sup>17</sup> as its ruling, the Supreme Court of Florida appears to have continued the trend toward expansion of a landowner's liability to those injured on his premises. In *Billen*, the Fourth District held that where the presence of the injured person is known to the landowner, and the landowner's active conduct or affirmative negligence (as opposed to the mere condition of the premises) is the cause of the injury, the landowner is liable to the injured person on principles of ordinary negligence. The Fourth District described the rule as representing the "great weight of authority and better reasoning."<sup>18</sup> The holding draws a clear distinction between instances where the injury is caused by the landowner's active negligence (where ordinary care is the proper standard of conduct) and instances where the injury results solely from the condition of the premises (where the duty owed depends upon the status of the person on the land.) The Supreme Court of Florida denied certiorari with opinion, thereby totally approving of the view taken by the Fourth District.<sup>19</sup> The court noted that the negligence of the defendant-landowners had no relationship whatsoever to the condition of the premises. One of the defendants had been called by his neighbor to assist in starting her car. As the plaintiff was pouring gasoline into the carburetor of the car, parked at the time on the defendants' premises, the gasoline burst into flames, causing the plaintiff serious burns.<sup>20</sup> The court observed that the fact that at the time of the injury the car was located on the defendants' premises (rather than on the curb, in a parking lot or elsewhere) was a mere happenstance. The defendants' act of negligence was totally unconnected with the condition of the defendants' premises.<sup>21</sup>

17. 260 So. 2d 284 (Fla. 4th Dist. 1972), *cert. denied with opinion*, 284 So. 2d 209 (Fla. 1973) [hereinafter referred to as *Billen*], *overruling* *Cochran v. Abercrombie*, 118 So. 2d 636 (Fla. 2d Dist. 1960).

18. *Billen v. Hix*, 260 So. 2d 284, 286 (Fla. 4th Dist. 1972).

19. *Hix v. Billen*, 284 So. 2d 209 (Fla. 1973). *Compare* *Eastburn v. Ford Motor Co.*, 438 F.2d 125 (5th Cir. 1971) (denial of certiorari by the Supreme Court of Florida is tantamount to an affirmation of the merits of the decision below) *with* *Keay v. City of Coral Gables*, 236 So. 2d 133 (Fla. 1970) (denial of certiorari cannot be construed as passing on any issues in litigation in the court below).

20. Presumably, the flames were caused by the act of the defendant, who turned on the ignition while the gasoline was being poured. There was a dispute of fact as to whether the defendant had started the car contrary to the plaintiff's instructions. This question, the court felt, was an issue of fact for the jury, thus precluding summary judgment for the defendant.

21. On the surface, there would appear to be an inconsistency between the *Billen* holding and the court's previous decision in *LeBase*. In the latter case, the court had ruled that the dangerous condition must exist on the defendant's premises, and expressly "decline[d] to extend a homeowner's liability to injuries caused by unknown dangerous conditions on adjacent property." *Britz v. LeBase*, 258 So. 2d 811, 813 (Fla. 1971). On the other hand, the court reasoned in *Billen*:

The automobile which plaintiff and defendant were attempting to start happened to be located in defendant's driveway. It could have just as easily been parked on the side of the street in front of defendant's house. The location of the car was purely fortuitous, and had nothing whatever to do with the injury suffered by plaintiff. Defendant's liability vel non to plaintiff should not depend upon the hazardous circumstance of the car's location, when such circumstance is completely extraneous to the cause of the accident.

B. *Mental Distress*

Where the defendant's negligence causes only mental disturbance, without accompanying physical injury or any other independent basis for tort liability, plaintiffs have been generally denied recovery.<sup>22</sup> However, in *Way v. Tampa Coca-Cola Bottling Co.*<sup>23</sup> recovery was allowed. The plaintiff was drinking from a Coca-Cola bottle when he noticed a foreign substance inside the bottle. The foreign object resembled a rat with the hair sucked off. He then vomited and thereafter remained nauseated for two days. Subsequently, the plaintiff developed an aversion to dark colored drinks. He sued the defendant processing company on grounds of implied warranty of fitness and negligence. The defendant claimed that recovery should not be allowed because the evidence failed to show any physical injury, but merely a mental reaction to the object contained in the bottle. The trial court directed a verdict for the defendant. The District Court of Appeal, Second District, however, reversed, deeming the time right for adherence to the trend toward protection of the ultimate consumer.<sup>24</sup> The court noted that recovery should be permitted, particularly in factual situations similar to that in *Way*. The evidence in *Way* showed that the object inside the bottle was loathsome in nature, and therefore it was reasonably foreseeable that its presence would cause nausea and mental distress. The mental distress, the court observed, was evidenced by the vomiting. However, the court expressly refrained from taking any view as to "those cases where there is neither physical impact nor any objective physical symptom such as vomiting . . . ."<sup>25</sup>

Subsequently, however, in *Arcia v. Altagracia Corp.*<sup>26</sup> the District

*Billen v. Hix*, 260 So. 2d 284, 287 (Fla. 4th Dist. 1972).

However, this apparent conflict may be reconciled as follows: The location of the dangerous condition causing the injury is irrelevant only in those cases where the injury is caused by the active negligence of the landowner and is totally unconnected with the condition of the premises.

22. W. PROSSER, LAW OF TORTS § 54, at 328 (4th ed. 1971).

23. 260 So. 2d 288 (Fla. 2d Dist. 1972) [hereinafter referred to as *Way*].

24. The court stated that it would be proper to hold that there had been sufficient contact to "get around" the impact rule, since there was ample authority to support the view that the slightest impact or contact will suffice. *Id.* at 289.

25. *Id.* at 290. Initially, the court reasoned, quoting from other authorities, that: [W]hatever the language used, all of the cases hold in effect that when a foreign unwholesome substance is found in a sealed package or bottle of food or beverage, there arises an inference, a prima facie case or presumption of the existence of negligence on the part of the manufacturer or bottler.

*Id.* at 289.

Ultimately, however, the court concluded that in food and beverage liability cases, the consumer would be allowed to recover on whatever theory necessary to afford him a remedy. The court then expressly adopted the rule set forth in an analogous case from another jurisdiction, *Wallace v. Coca-Cola Bottling Plants*, 269 A.2d 117, 121 (Me. 1970), as follows:

In those cases where it is established by a fair preponderance of the evidence [that] there is a proximate causal relationship between an act of negligence and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable plaintiff, such proven damages are compensable even though there is no discernible trauma from external causes.

*Id.* at 290.

26. 264 So. 2d 865 (Fla. 3d Dist. 1972).

Court of Appeal, Third District, re-affirmed the impact rule in a negligence action seeking recovery for mental distress unaccompanied by physical injury. The bathroom ceiling of the apartment rented by the plaintiffs from the defendant fell and almost struck the plaintiff's minor daughter. As a result, the child suffered shock and mental distress. The defendant claimed that recovery should be disallowed because of the absence of impact upon the child's body. The injuries, the defendant contended, had been caused solely by fright. The Third District agreed and affirmed summary judgment for the defendant.<sup>27</sup> A strong trend towards substantial relaxation of the impact rule has reached most American jurisdictions.

The same year witnessed attempts by the Fourth and Second Districts to dispense with impact as a pre-requisite to recovery for mental distress in a negligence action. In *Stewart v. Gilliam*,<sup>28</sup> the plaintiff suffered fright and a subsequent heart attack when one of the cars involved in an intersectional collision struck her house "with a great thud" and came to rest against it. Reasoning that impact had become a minority rule, the District Court of Appeal, Fourth District, labeled the requirement as outmoded and no longer serving any useful purpose. Thus, the court held that a plaintiff could recover for the physical consequences of negligently inflicted mental distress in the absence of impact.

However, in a four-three decision, the Supreme Court of Florida reversed.<sup>29</sup> It adopted the views espoused by the Fourth District's dissenting opinion in *Gilliam*, stating:

We do not agree that especially under the facts in this case, there is any valid justification to recede from the long standing decisions of this Court in this area. There may be circumstances under which one may recover for emotional or mental injuries, as when there has been a physical impact or when they are produced as a result of a deliberate and calculated act performed with the intention of producing such an injury by one knowing that such act would probably—and most likely—produce such an injury, but those are not the facts in this case.<sup>30</sup>

Along the same lines was *Johnson v. Herlong Aviation, Inc.*<sup>31</sup> The

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27. In so holding, the court relied primarily on long standing Florida case law, quoting therefrom:

This court is committed to the rule . . . that there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved.

*Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950).

28. 271 So. 2d 466 (Fla. 4th Dist. 1972), *rev'd*, 291 So. 2d 593 (Fla. 1974) [hereinafter referred to as *Gilliam*].

29. *Gilliam v. Stewart*, 291 So. 2d 593 (Fla. 1974). For a complete discussion of the case, see 28 U. MIAMI L. REV. 705 (1974).

30. *Gilliam v. Stewart*, 291 So. 2d 593, 595 (Fla. 1974).

31. 271 So. 2d 226 (Fla. 2d Dist. 1972) [hereinafter referred to as *Johnson*]. *Johnson* was decided only six days prior to *Gilliam*. In *Johnson*, however, there was no ensuing physical injury; the plaintiff merely suffered fright and consequent mental anguish.



plaintiff husband purchased an airplane from the defendant. Accompanied by his wife, he flew to the Grand Bahamas. During the return trip, the aircraft developed severe vibrations and other difficulties. As a result, the plaintiff wife suffered fright and consequent mental pain and suffering. They brought an action for mental distress against the aircraft company. Although taking the view that the time to break away from impact was at hand, the District Court of Appeal, Second District, nonetheless declined to turn its back on Florida precedent. This decision was affirmed by the Supreme Court of Florida.<sup>32</sup>

### C. *Violation of Statute or Ordinance*

The standard of conduct required of a reasonable man may be prescribed by the legislature. If a legislative enactment provides that certain acts shall or shall not be done, the statute may be construed as setting a standard of care for members of the community. Thus, if conduct falls below that standard, negligence results.<sup>33</sup>

There is a division of authority with respect to the procedural effect of a violation of a statute or ordinance in cases of this type. The majority takes the view that a violation is conclusive on the issue of negligence and that the court must so charge the jury. Stated otherwise, the violation constitutes "negligence per se" in most American jurisdictions. A substantial minority of jurisdictions, however, hold that a violation is merely "evidence of negligence," which the jury may accept or reject as it deems proper.<sup>34</sup>

In *de Jesus v. Seaboard Coast Line R.R.*,<sup>35</sup> the plaintiffs sued the defendant railroad for injuries sustained when their car struck the defendant's tank car. The railroad car stood parked, blocking a railroad intersection during dark hours. The crossing was, however, totally unlighted, in violation of a safety standard imposed by statute. The Supreme Court of Florida held that violation of a statute imposing upon a railroad a duty to protect occupants of automobiles from colliding with unlighted trains blocking highways at night at unlighted crossings was negligence per se.

In so holding, the Supreme Court of Florida established three categories of statutes which are determinative in the resolution of the issue of negligence per se. The negligence per se standard is now applicable (a) to violations of the "strict liability" statutes, namely those designed to protect a particular class of persons from their inability to

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32. *Herlong Aviation, Inc. v. Johnson*, 291 So. 2d 603 (Fla. 1974). As to liability for injuries suffered from a suicide attempt following an automobile accident, see *Byrum v. Williams*, 276 So. 2d 836 (Fla. 4th Dist. 1973). Although faced with a question of first impression, the court seemed inclined to allow recovery if the causal connection between the defendant's wrongful act and the suicide effort is properly established.

33. W. PROSSER, *LAW OF TORTS* § 36, at 190 (4th ed. 1971).

34. *Id.* at 200-201.

35. 281 So. 2d 198 (Fla. 1973). This case is noted at 28 U. MIAMI L. REV. 719 (1974).

protect themselves,<sup>36</sup> and (b) to violations "of any other statute which establishes a duty to take precautions to protect a particular class of persons from a particular injury or type of injury."<sup>37</sup> However, the prima facie evidence standard is applicable to any other type of statute, including violations of traffic regulations.<sup>38</sup>

The first category, that of "strict liability" statutes, includes statutes of the type which prohibit the sale of firearms to minors. Contributory negligence is not a defense. With respect to the second category, the court cautioned that the fact that the applicable standard was that of negligence per se did not mean that actionable negligence would automatically ensue from the violation. The plaintiff must establish that he falls within the class that the statute was intended to protect, that he suffered injury of the type that the statute was designed to guard against, and that the violation was the proximate cause of his injury. Contributory negligence is a defense to this action.<sup>39</sup>

Though decided prior to the supreme court decision in *de Jesus, Baldridge v. Hatcher*<sup>40</sup> also provides an example of the type of statute enacted for the protection of a specified class of persons. The fourteen-year-old plaintiff was injured while employed by the defendant to operate dangerous equipment. This was in violation of a statute which prohibited the employment of minors under sixteen in jobs connected with power-driven machinery. Ruling that negligence per se was the proper standard, the court stated:

The legislature, in prohibiting the employment of minors to operate dangerous machinery, has imposed strict liability on the employer. In effect, the employment is said to be the act from which the injury follows as the foreseeable consequence.<sup>41</sup>

The third category of statute is illustrated by *Seaboard Air Line*

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36. 281 So. 2d at 201.

37. *Id.*

38. *Id.*

39. It is submitted that in practice it might be difficult to differentiate between the first two categories established by the court. The traditional distinction has merely been between statutes designed to protect a particular class of persons and statutes enacted for the protection of the public at large. See *Seaboard Coast Line R.R. v. deJesus*, 266 So. 2d 108 (Fla. 2d Dist. 1972). Areas of overlap could well result in attempting to draw distinctions between statutes designed to protect "a particular class of persons from their inability to protect themselves," on the one hand, and statutes which establish a duty to take precautions to protect "a particular class of persons from a particular injury or type of injury," on the other hand. *Id.* at 201.

Ruling that the applicable standard was negligence per se, the court thus reversed the decision of the Second District on the ground that the statute involved, although not of the strict liability type, was one belonging to the second category. This class of statutes, the court felt, imposed upon the defendant railroad a "stricter duty of care" to protect automobile drivers from injuries sustained in accidents with unlighted trains blocking intersections during night hours.

40. 266 So. 2d 112 (Fla. 2d Dist. 1972) [hereinafter referred to as *Baldridge*].

41. *Id.* at 113.

*R.R. v. Hawes*,<sup>42</sup> also decided prior to *de Jesus*. The plaintiff's motor-cycle struck the defendant's train while it was moving through a crossing in the City of West Palm Beach. Although required by a city ordinance, the defendant did not erect or maintain safety gates at the intersection. The District Court of Appeal, Fourth District, took the view that the ordinance in question was akin to a traffic ordinance, thus holding that its violation constituted only prima facie evidence of negligence.<sup>43</sup>

#### D. Landlord-Tenant

In *University Plaza Shopping Center v. Stewart*,<sup>44</sup> the Supreme Court of Florida adopted the rule that a clause in a lease agreement, providing for the indemnification of the landlord by the tenant from all claims for personal injury sustained upon the leased premises, does not indemnify the landlord for damages resulting *solely* from his own negligence. The clause will indemnify the landlord for his negligence only where such an intention is expressed "in clear and unequivocal terms" in the lease agreement. This clear expression of intent must be shown by a specific provision in the lease to that precise effect. In *Stewart*, the landlord leased shopping center space to the operator of a barber shop. A gas line running underneath the leased property exploded and caused fatal injuries to a barber. His widow sued the landlord for wrongful death. The landlord, in turn, filed a third-party complaint against the tenant. The landlord claimed that the indemnity provision in the lease entitled him to indemnity. The trial court entered summary judgment for the tenant on the ground that an indemnity clause, phrased in general terms, is inapplicable to liability resulting solely from the negligence of the landlord. The First District affirmed without opinion. On certiorari, the Supreme Court of Florida adhered to the rule that the intent of the parties to indemnify the landlord for his own negligence must be specifically provided for in an indemnity contract. The court took the view that the use of the general terms "[t]enant shall indemnify . . . the Landlord . . . from and against any and all claims for any personal injury . . . in and about the demised premises" was not sufficient to disclose an intention to indemnify for consequences arising solely from the negligence of the indemnitee landlord.<sup>45</sup>

The court, however, explicitly stated that it was not resolving the case (1) where indemnification is sought pursuant to the *joint* negligence

42. 269 So. 2d 392 (Fla. 4th Dist. 1972), *cert. denied*, 272 So. 2d 816 (Fla. 1973).

43. The court explained that such prima facie showing was rebuttable by evidence of other facts and circumstances tending to "eliminate the character of negligence from the transaction." *Id.* at 396. Thus, proffered evidence of a pending suit in which the defendant was challenging the validity of the ordinance was properly admissible for the limited purpose of explaining the absence of gates in the jury's consideration of the evidence.

44. 272 So. 2d 507 (Fla. 1973) [hereinafter referred to as *Stewart*], *overruling* *Thomas Awning & Tent Co. v. Toby's Twelfth Cafeteria, Inc.*, 204 So. 2d 756 (Fla. 3d Dist. 1967).

45. *University Plaza Shopping Center v. Stewart*, 272 So. 2d 507, 508-09 (Fla. 1973).

of both landlord and tenant; or (2) where the item causing the injury is located upon the leased premises rather than remaining under the control of the landlord; or (3) where separate and independent acts of negligence on the part of both landlord and tenant cause the injury. In fact, the court cautioned that "this cause is for liability resulting *solely* from the negligence of the indemnitee,"<sup>46</sup> thus limiting its ruling to factual situations involving "general" indemnity clauses, similar to the one in question.

Three months after *Stewart*, the District Court of Appeal, First District, decided *Poche v. Leon Motor Lodge*,<sup>47</sup> apparently without knowledge of the *Stewart* case. Although the case involved a clause similar to that in *Stewart*, the court nonetheless affirmed without opinion a summary judgment for the landlord. The dissenting opinion disclosed that the tenant minor was playing with another child in the landlord's apartment complex. The child ran into a glass door, which shattered upon impact and injured him. The lease agreement between the tenant and the landlord contained a provision that the "[t]enants agree to hold [the] Landlord . . . harmless from any and all liability . . . for . . . any injury to themselves, members of their family, servants and invitees . . . arising from any cause whatsoever, or . . . from the use [of the leased premises]."<sup>48</sup> The tenant sued the landlord claiming, *inter alia*, that the landlord was negligent in failing to provide safeguards for the protection of children against the large, virtually invisible glass area. The landlord interposed the defense of the exculpatory clause in the lease. The dissent agreed with the tenant's contention that such lease provisions are invalid, reasoning that contracts of indemnification from liability for negligent acts are generally not favored.<sup>49</sup>

The previous year, the District Court of Appeal, Third District, had ruled for the landlord in *Middleton v. Lomaskin*,<sup>50</sup> a case likewise involving an exculpatory clause in a lease agreement. The result, however, is consistent with the later decisions previously discussed. In *Middleton*, the exculpatory provision disclosed a clear, unequivocal intention to relieve the landlord from liability for his own negligence. The plaintiff tenant sued the landlord for injuries sustained when he fell on the leased prop-

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46. *Id.* at 512. The court analogized the landlord's act in maintaining the gas line underneath shopping center rental space to that of a "common stairway" maintained in an apartment building. Such an act constitutes an independent act of negligence, which gives rise to the landlord's separate liability. One would not expect the liability of the tenant to extend to a negligently maintained common passageway or to a mall in front of the tenant's shop.

47. 275 So. 2d 55 (Fla. 1st Dist. 1973) [hereinafter referred to as *Poche*].

48. *Id.* at 56 (dissenting opinion).

49. Thus, although also apparently unaware of the *Stewart* decision, the dissent in *Poche* would presumably go further than *Stewart*, *i.e.*, it would throw a blanket prohibition on all such indemnity clauses. In contrast, *Stewart* would uphold such clauses only when an intention to indemnify for negligence is clearly expressed. The dissent also placed some weight on the fact that the tenant was deprived of an opportunity to prove whether the glass door met Florida or federal minimum statutory safety standards.

50. 266 So. 2d 678 (Fla. 3d Dist. 1972) [hereinafter referred to as *Middleton*].

erty. The lease agreement provided that the landlord would not be liable for any loss, damage or injury, "whether caused by negligent acts of [the] Landlord, its agents or servants or otherwise."<sup>51</sup> The Third District rejected the tenant's contention that his waiver of liability failed to immunize the landlord from liability for the latter's negligence.<sup>52</sup> Rather the Third District held that such exculpatory contracts, while not looked upon with favor, had been held valid and enforceable where the intention to relieve a party for liability from his own negligence is made clear and unequivocal. As applied to the contract in question, the provision clearly absolved the landlord for his own negligence.

*Bowen v. Holloway*<sup>53</sup> is an interesting decision in the area of a landlord's liability for injuries to third persons caused by a defective condition in the leased premises. The landlord owned certain pasture land, adjacent to which was a stall area. The property was used to pasture and feed horses and the owners of the animals leased the property for such purpose. The stall area was fenced on three sides, but was unfenced on the side overlooking a public street. On the night in question, the tenant's horse strayed from the pasture to the public highway. While the plaintiff was riding his motorcycle on the street, he collided with the running horse. He sought damages for personal injuries against both the landlord and the owner of the horse. In reversing summary judgment in favor of the landlord, the District Court of Appeal, Fourth District, stated that a landlord may be held liable to third persons for injuries sustained as a result of defects in the leased premises when the condition of the premises is in the nature of either "an existing or incipient nuisance."<sup>54</sup> The fact that a lessee is interposed between the property owner and the party injured does not affect the responsibility of the owner, who originates

51. *Id.* at 679.

52. In the alternative, the landlord claimed that the lease provision was unconstitutional.

53. 255 So. 2d 696 (Fla. 4th Dist. 1971) [hereinafter referred to as *Bowen*].

54. *Id.* at 697. In so ruling, the court relied on a very early Florida precedent, *Simms v. Kennedy*, 74 Fla. 411, 76 So. 739 (1917) [hereinafter referred to as *Simms*]. It stated the applicable principle as follows:

[I]f at the time they are leased, the premises are or contain an incipient nuisance which becomes active by the tenant's ordinary use of the premises, the landlord is liable to third persons injured as a natural consequence thereof, and while this liability is generally referred to the law of nuisance, it exists when predicated upon negligence, as well as when predicated upon an intentional wrong.

*Bowen v. Holloway*, 255 So. 2d 696, 698 (Fla. 3d Dist. 1972).

In *Hauben v. Melton*, 267 So. 2d 16 (Fla. 1st Dist. 1972), the tenant's social guest fell from an upper porch to the ground when the railing against which he was leaning gave way. Relying on *Post v. Lunney*, 261 So. 2d 146 (Fla. 1972), the court concluded that his status was that of a licensee. As such, the landowner owed him no duty to protect him from injuries arising from unknown defects in the premises. The court attempted to harmonize *Simms*, stating that pursuant to the standards set forth therein, one who has the dual role of landlord-landowner may increase his liability to social guests by bringing into play applicable provisions of local or state law or other circumstances; however, absent such local or state laws, there is no reason to impose a greater burden upon a landlord merely because he is also a landowner. The question would appear to have become moot after the *Camp* case which gave the social guest the status of an invitee. See notes 12 through 16 *supra* and accompanying text.

the injury. The dangerous condition which allegedly constituted the incipient nuisance was the absence of a fence on the street side of the stall area. The court therefore ruled that a factual issue was present as to whether such a condition constituted a nuisance.

The District Court of Appeal, Third District, has expressed the view that the landlord has an affirmative duty to exercise reasonable care to inspect and repair entrances and common passageways for the protection of tenants. The obligation is, however, only one of reasonable care, and the landlord will not be held liable if: (1) the injury was not reasonably foreseeable; or (2) the condition was not discoverable by a reasonable inspection; or (3) the condition was created by the tenant himself or by a third person. The landlord will be held liable, however, if the condition is shown to have existed for such a sufficient length of time that it should have been discovered in the proper exercise of due care.<sup>55</sup> In *Hester v. Guarino*,<sup>56</sup> the tenant slipped and fell in a hole located in the grassy lawn area near the entrance to her apartment. The hole was considerably long, deep and wide, and could not be detected because the grass in it had grown to the level of the lawn grass. The lawn was maintained by the landlord, who had himself mowed this particular area approximately two weeks before the accident. Considering the evidence sufficient to present a jury question as to the landlord's negligence, the Third District observed that "[g]rass does not grow in and around such a hole overnight."<sup>57</sup> Thus, it was reasonable to infer that the condition had existed for a sufficiently long period of time. The landlord, at the time he mowed the lawn, should have discovered the hole in the proper exercise of ordinary care.

#### E. Master-Servant

A servant's conduct falls within the course and scope of his master's employment (1) if it is of the kind he is employed to perform; (2) if it takes place substantially within the time and space limits authorized by his master; and (3) if it is triggered, at least partially, by a purpose to serve the master.<sup>58</sup> If these factors concur, the employer is responsible for the wrongful acts of his servant. Thus, in *Whetzel v. Metropolitan Life Ins. Co.*,<sup>59</sup> the District Court of Appeal, Fourth District, held that a verdict may be directed for the employer where the undisputed facts establish a marked departure from the employer's business. In *Whetzel*, the employee was on a business trip to a company convention. One evening, he left the hotel where the convention was being held with two other agents of the company. They drove around town, stopping in various bars along the way. The employee struck the plaintiff on his motorcycle,

55. *Hester v. Guarino*, 251 So. 2d 563 (Fla. 3d Dist. 1971), *cert. denied*, 259 So. 2d 715 (Fla. 1972).

56. *Id.*

57. *Id.* at 564.

58. *Whetzel v. Metropolitan Life Ins. Co.*, 266 So. 2d 89 (Fla. 4th Dist. 1972).

59. *Id.* [hereinafter referred to as *Whetzel*].

who sought damages against both the employee and the employer company for personal injuries sustained. After stating that an agent is within the scope of his employment while proceeding to or returning from a business meeting or convention provided there is no clear-cut deviation, the Fourth District nonetheless observed that "[i]t would be asking a lot of any court to infer that [the agent] out 'on the town' going from bar to bar at 3:30 A.M. [was] acting in the furtherance of the [employer's] business."<sup>60</sup> Thus, the court held that where there is no conflict in the facts, the question of whether the servant is acting within the scope of his employment in a particular instance is a question of law for the court.

In *Standley v. Johnson*,<sup>61</sup> the court spoke approvingly of "the well recognized rule that an employee driving to or from work is not within the scope of employment . . . even though the car . . . is used in his work and partly maintained by the employer."<sup>62</sup> But in *Standley* the court ruled that where the employee is rendering a service for his employer and, while so doing, is involved in an accident, an issue of fact is raised so as to preclude summary judgment for the employer. This is so even though the employee is on his way to work and is not being compensated for his time. In *Standley*, the employee had gone to the drugstore to purchase some medicine for his wife. In a gas station across the street, he purchased some gasoline for use in the lawn mower he used at work. After dropping the medicine off, he proceeded to work. However, he stopped again at another gas station to purchase gas for his truck, which he also used in connection with his work. While leaving the service station, he struck the deceased's car. An action for her wrongful death was brought against the employer. The court reversed summary judgment in favor of the employer, reasoning that the employee "was doing more than merely driving to work"; in purchasing gasoline for use at work, he was fulfilling part of his job for the benefit of his employer.<sup>63</sup>

#### F. Doctor-Patient

A physician holds himself out as having that degree of skill and knowledge commonly possessed by other members of the medical pro-

60. *Id.* at 91.

61. 276 So. 2d 77 (Fla. 1st Dist.), *cert. denied*, 279 So. 2d 880 (Fla. 1973) [hereinafter referred to as *Standley*].

62. *Id.* at 78. Compare *Standley* with *Whetzel*, where the court stated that an agent is within the scope of his employment while proceeding to or returning from a business meeting or convention, provided, of course, that there is no clear-cut deviation. The principles may be possibly reconciled on the ground that *Whetzel* involved driving to or from a business meeting or convention, while *Standley* involved simply driving to and from the place of employment.

The *Standley* court distinguished the cases involving deviation from the employee's course of employment on the ground that in *Standley* the employee had completed his own personal errand and had returned to the service of his employer when he purchased the gasoline for use in the employer's business.

63. The employee had received instructions from his employer to maintain the lawn mower filled with gas.

fession. He will therefore be liable if harm results because his conduct falls below acceptable medical standards.<sup>64</sup> In *Wale v. Barnes*,<sup>65</sup> the defendant physician performed the delivery of plaintiff's baby. For such purpose, he chose one of two available types of forceps. The baby's head was, however, "considerably molded." After a "moderately difficult mid-forceps delivery," the baby was born severely bruised on the cheeks, with black eyes and a scalp laceration. During the three-month period ensuing birth, the baby's sleeping habits were unusual and his head changed shape from day to day. The child ultimately underwent brain surgery at another hospital after sustaining convulsion because of blood clots on his brain. The Supreme Court of Florida reversed a directed verdict for the defendant, holding that where expert medical testimony directly pinpoints the cause of the injury to a specific and definite negligent act (such as a forceps delivery), the plaintiff makes out a prima facie case on the question of causation. The principle applies although there is contradictory evidence indicating that the injury could have been caused by other non-negligent causes (such as the mere trauma of birth or rough movements down the birth canal). In so holding, the court relied on expert medical testimony to the effect that the type of forceps utilized by the defendant physician were no longer recognized as proper in deliveries of babies with molded or elongated heads. Such practice, the court concluded, constituted a departure from acceptable medical standards in Dade County, Florida.<sup>66</sup>

*Anclote Manor Foundation v. Wilkinson*<sup>67</sup> was an action grounded on breach of contract against a hospital. The suit arose out of the hospital's agreement with the plaintiff to render psychiatric and medical treatment to his wife. The plaintiff's wife was under the care of a hospital

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64. W. PROSSER, LAW OF TORTS § 32, at 162 (4th ed. 1971).

65. 278 So. 2d 601 (Fla. 1973), *rev'd* 261 So. 2d 201 (Fla. 3d Dist. 1972) [hereinafter referred to as *Wale*].

66. *Id.* A plaintiff states a prima facie case against a hospital if a hospital aide, while pushing the plaintiff patient in a wheelchair, manipulates it in such manner that the patient's arm is pinched against a table edge. In such a case, the jury may well conclude that the hospital owes the patient a duty of reasonable care; the hospital aide may have breached that duty by manipulating the wheelchair without due care, thus proximately causing the patient's injuries. *Cleaver v. Dade County*, 272 So. 2d 559 (Fla. 3d Dist. 1973). A paralyzed hospital patient was left alone sitting up on her bed with her feet dangling over the edge of the bed, contrary to her physician's instructions. Because of her legs' failure to hold her, she fell to the floor and injured herself. The patient stated a cause of action against the hospital for her injuries. *Hialeah Hosp. v. Johnson*, 276 So. 2d 53 (Fla. 1973) [hereinafter referred to as *Johnson*]. In *Johnson*, the plaintiff's injuries consisted of a serious fracture of the right leg, which was not discovered until the fourth day following the fall. By virtue of her paralysis, the plaintiff was unable to feel pain in her legs and the hospital staff failed to take any x-rays following the accident. The plaintiff's attending physician, who was out of town at the time of the accident, had prescribed sitz baths. The fracture was aggravated by the hospital staff's continuing the sitz bath treatment, and it consequently became necessary to amputate the plaintiff's leg. The court sustained the jury verdict for the plaintiff, concluding that the hospital's conduct fell below the minimum standard of care ordinarily required of the medical profession.

67. 263 So. 2d 256 (Fla. 2d Dist. 1972).



psychiatrist who told her that "he was going to divorce his wife and he wanted to marry her."<sup>68</sup> Expert witnesses testified that the "acting out" of the psychiatrist's feelings towards the plaintiff's wife (known as "countertransference") constituted conduct which fell below acceptable psychiatric and medical standards. The plaintiff, in turn, divorced his wife after her discharge from the hospital. The following year, she committed suicide.<sup>69</sup> A jury verdict awarded the plaintiff the amount paid by him to the defendant hospital for the services he had contracted for. The District Court of Appeal, Second District, affirmed the verdict, ruling that where there is a breach of contract on the part of a physician which destroys the possibility of any benefit that might be derived from skillful treatment, the plaintiff is entitled to recover all expenses incurred by him in the entire course of treatment.<sup>70</sup>

On the other hand, an absolute privilege or immunity from liability has been extended to psychiatrists who are court appointed for the purpose of determining a person's mental competency. The privilege is similar to that extended to judicial proceedings.<sup>71</sup> In *Cawthon v. Coffey*,<sup>72</sup> the plaintiff claimed that the defendants, a court-appointed committee of practicing psychiatrists, had examined him in a cursory and superficial manner. The plaintiff argued that the psychiatrists' negligence and recklessness in failing to make a thorough medical examination had resulted in his adjudication of incompetency. The court affirmed the lower court's order granting the defendant's motion to dismiss because an absolute privilege protects these court-appointed committees from the imposition of liability.<sup>73</sup>

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68. *Id.* at 257.

69. The evidence also showed that in the period between the plaintiff's wife's discharge from the hospital and her suicide, the wife's only brother was killed in Viet Nam and her grandmother passed away. The court held that it was proper to introduce, for the jury's consideration, all evidence relating to the divorce, the wife's death by suicide, her brother's death in Viet Nam and her grandmother's passing away.

70. The court also rejected the defendant's contention that it was error to find as a matter of law that the psychiatrist was guilty of malpractice, reasoning that all medical experts had testified that the psychiatrist's conduct fell below acceptable psychiatric standards. In *Carter v. Metropolitan Dade County*, 253 So. 2d 920 (Fla. 3d Dist. 1971), *cert. denied*, 263 So. 2d 584 (Fla. 1972), the court affirmed a final judgment, entered pursuant to a jury verdict, in favor of the defendant hospital, its physicians and the manufacturer of the drug "Mellaril." After an unsuccessful suicide attempt, the plaintiff's fourteen year old daughter was committed to the hospital by juvenile authorities. She was treated with the drug "Mellaril," the dosage being gradually increased to 2,400 milligrams per day. This was apparently three to four times the manufacturer's recommended dosage. Presumably, one of the doctors knew of the "sudden death phenomenon" associated with the drug.

71. *Cawthon v. Coffey*, 264 So. 2d 873 (Fla. 2d Dist. 1972).

72. *Id.*

73. The court omitted any discussion of the defendant's cross-assignment of error that the lower court was incorrect in holding that an action would lie against a court-appointed physician who "deliberately" performs a mental examination in an "improper or negligent" fashion, with the "intent" to inflict severe emotional distress upon the person being examined. There seems to be an inconsistency in speaking of a combination of negligence and intent within the same act. If an act is deemed merely negligent, it should not also be classified as intentional. The converse is also true. If, however, liability is to be predicated on the existence of intentional conduct, the principle appears to be sound.

*Rosen v. Parkway General Hospital*<sup>74</sup> involved a suit against the defendant hospital and its physicians. The only negligent act attributed by the plaintiff to the hospital and its physicians was their failure to act promptly enough to save the life of the plaintiff's child. The child had been struck by an automobile, severely injured and taken to the defendant's emergency facilities. The plaintiff, however, failed to present any fact or medical opinion to support the allegation of failure to act timely. On the other hand, uncontroverted testimony of an operating surgeon at another hospital showed that the injuries were so serious in nature that the child could not have survived in any event. The District Court of Appeal, Third District, upheld a summary judgment for the defendants upon a conclusive showing that the element of proximate cause was lacking.

### G. Attorney-Client

In *Weiner v. Moreno*,<sup>75</sup> the plaintiff retained the defendants, practicing attorneys, to bring a medical malpractice action for the wrongful death of her husband, who had been involved in a serious car accident. The plaintiff's husband died two weeks after undergoing emergency surgery at Jackson Memorial Hospital.<sup>76</sup> The defendants filed the medical malpractice action, but the suit was dismissed for lack of prosecution after the statute of limitations had run. In the ensuing suit against the attorneys, the trial court entered summary judgment on the issue of liability. A trial as to damages ensued. The defendant-attorneys were precluded from introducing evidence as to the cause of death, which they claimed was proximately caused by the serious injuries sustained in the accident, rather than by the hospital's malpractice. Thus, their contention was that the plaintiff's claim was truly without merit and was brought solely for the purpose of forcing some settlement on the hospital bill. The District Court of Appeal, Third District, reversed the summary judgment and remanded the case for a new trial on the issue of proximate cause. In so ruling, the court expressly adopted the following rule in Florida:

In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.<sup>77</sup>

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74. 265 So. 2d 93 (Fla. 3d Dist. 1972).

75. 271 So. 2d 217 (Fla. 2d Dist. 1973) [hereinafter referred to as *Weiner*].

76. The facts disclosed that two surgical packs were left in the deceased's body.

77. *Weiner v. Moreno*, 271 So. 2d 217, 219 (Fla. 2d Dist. 1973). The rule was initially set forth in the early case of *Maryland Casualty Co. v. Price*, 231 F. 397 (4th Cir. 1916). The *Weiner* court observed that

the rule it established has been adopted in approximately forty-five states . . . . While Florida courts have not adopted the specific language of the *Price* rule, the substance of that rule is evident in various Florida cases . . . . [T]his court now affirmatively adopts *Price* and applies the rule quoted to the instant case.

*Weiner v. Moreno*, 271 So. 2d 217, 219 (Fla. 2d Dist. 1973).

Although concluding that the plaintiff had met the first two requirements, the court ruled that recovery for legal malpractice could not be had if the plaintiff's husband had died as a result of the serious injuries sustained in the automobile accident rather than as a result of the medical malpractice.<sup>78</sup>

#### H. *Manufacturers and Suppliers*

Personal injury actions are oftentimes bottomed on warranty theories. Although truly a contract concept, warranty is akin to the concept of strict liability in tort. The plaintiff need not prove lack of due care, but only the existence of a defect in the product.<sup>79</sup>

It has been held that a manufacturer is liable to a consumer on implied warranty grounds if the first container of a product<sup>80</sup> is defective, but not if the defect is found in the secondary container.<sup>81</sup> The retailer, however, is liable for a defect in the secondary container.<sup>82</sup> In *Reese v. Florida Coca-Cola Bottling Co.*,<sup>83</sup> the plaintiff lifted a six-pack carton of Coca-Cola from the display rack at a retail food store. On her way to the check-out counter, one of the bottles exploded, cutting her leg above the ankle. The plaintiff brought an action for breach of implied warranty of fitness against the manufacturer of the bottle. The plaintiff claimed that the Coca-Cola bottle was defective when delivered by the manufacturer to the food store. Thus, she argued, the manufacturer breached its implied warranty of fitness by packaging the product and delivering it for sale in a defective condition. The court stated that (1) if a bottler or manufacturer of a product which is intended for human consumption packages the same in a glass container, and (2) if in order to consume the product it is also necessary to use the container, then the manufacturer impliedly warrants that the container is reasonably fit for the purpose for which it was intended. Stated simply, "if a defect is shown to be the cause of the container breaking or exploding, then liability . . . may be imposed on the manufacturer or bottler."<sup>84</sup>

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78. In so holding, the court relied on *Rosen v. Parkway Gen. Hosp.*, 265 So. 2d 93 (Fla. 3d Dist. 1972). See note 74 *supra* and accompanying text.

79. See *E.R. Squibb & Sons v. Stickney*, 274 So. 2d 898 (Fla. 1st Dist.), *cert. denied*, 285 So. 2d 414 (Fla. 1973); *E.R. Squibb & Sons v. Jordan*, 254 So. 2d 17 (Fla. 1st Dist. 1971).

80. *I.e.*, a bottle containing a beverage. *Reese v. Florida Coca-Cola Bottling Co.*, 256 So. 2d 392 (Fla. 1st Dist. 1972).

81. *I.e.*, the cardboard carton holding the bottles. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. 4th Dist. 1973).

82. *Id.*

83. 256 So. 2d 392 (Fla. 1st Dist. 1972) [hereinafter referred to as *Reese*].

84. *Id.* at 393. The court stated that the evidence produced by the plaintiff was sufficient to bring the case within the implied warranty doctrine. The judgment for the defendant manufacturer was nonetheless affirmed because there was evidence that the explosion may have been caused by causes other than a defect in the product. In the face of conflicting proof, it was properly within the province of the jury to resolve the conflict in the evidence. *Id.* at 394.

A significant factor in *Reese* was that the plaintiff claimed the existence of a defect in the bottle (the first container), not in the six-pack carton holding the bottle (the secondary container). In fact, the evidence showed that the carton was unbroken and that the top of the broken bottle with the cap still on it was found near a display case a distance of several feet from where the accident took place.

In *Schuessler v. Coca-Cola Bottling Co. of Miami*,<sup>85</sup> the plaintiff claimed that the cardboard carton containing the Coca-Cola bottles was defective. The plaintiff had just lifted a carton of six sixteen-ounce Coca-Cola bottles from the display rack when the bottom of the carton failed, causing one bottle to drop to the floor and injure the plaintiff. The plaintiff sued both the retailer and the bottling company on grounds of negligence and breach of implied warranty of merchantability. The District Court of Appeal, Fourth District, discussed the liability of the retailer on warranty grounds, relying on section 2-314 of the Uniform Commercial Code.<sup>86</sup> The court found that the Code made the retailer liable for a defective secondary container, stating:

The statute imposes on the retailer a warranty of merchantability which covers not only the product which is the object of the sale, but the adequacy of the container and its packaging—which in this case would include the paper carrying carton. Whether a product is adequately contained and packaged within the requirement of the statute would depend on whether at the time of the purchase the container and packaging were reasonably suited for their ordinarily intended function. This is a fact question for the jury where legally sufficient evidence is presented.<sup>87</sup>

Section 2-314 was held inapplicable to the bottling company, however, by virtue of its wording that “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”<sup>88</sup> Since a contract for sale did not take place between the bottling company and the consumer, the court found itself compelled to fill the gap by referring to case law to determine the liability of the bottler. Under Florida precedent, the bottler of a product intended for human consumption impliedly warrants to the

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85. 279 So. 2d 901 (Fla. 4th Dist. 1973) [hereinafter referred to as *Schuessler*]. See 28 U. MIAMI L. REV. 246 (1973), for a discussion of the case.

86. The Uniform Commercial Code was adopted in Florida effective January 1, 1967. Section 2-314 provides in pertinent part:

- (1) . . . [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . .
- (2) Goods to be merchantable must be at least such as . . . .
- (c) are adequately contained, packaged, and labeled as the agreement may require

UNIFORM COMMERCIAL CODE § 2-314; FLA. STAT. § 672.314 (1973).

87. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901, 903 (Fla. 4th Dist. 1973).

88. UNIFORM COMMERCIAL CODE § 2-314(1); FLA. STAT. § 672.314(1) (1973), quoted in *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901, 903 (Fla. 4th Dist. 1973).

ultimate consumer that the product is reasonably fit for that purpose and that the container is adequate when it leaves the bottler's hands. However, the court observed that Florida law was unsettled on the question of whether an implied warranty of merchantability on the "secondary container" extends to a remote buyer. Failing to find a "sound basis" for the imposition of liability on the bottler for a defective secondary container, the court affirmed the directed verdict in favor of the bottling company.<sup>89</sup>

Pursuant to statutory enactment, the supplying of blood in Florida is a service, as opposed to a sale. Section 672.316(5) of the Florida Statutes (1973), a part of the statutory chapter encompassing the Uniform Commercial Code in Florida, further provides that: "the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed."<sup>90</sup>

Prior to the enactment of this statute, Florida case law held that the handling of blood for transfusion purposes was a sale, not a service. Thus, one who supplied unfit or impure blood was liable on theories of implied warranty.<sup>91</sup> In *Rostocki v. Southwest Florida Blood Bank, Inc.*,<sup>92</sup> the plaintiff contracted hepatitis as a result of a blood transfusion, the blood for which was supplied by the defendant blood bank. The plaintiff based her cause of action on a "strict liability" theory of breach of the implied warranties of merchantability and fitness. Finding the statute inapplicable by virtue of the fact that the cause of action arose prior to its enactment,<sup>93</sup> the Supreme Court of Florida applied earlier Florida case law which held that the supplying of blood was a sale. Thus, the defendant was subject to strict liability because blood supplied for the purpose of a blood transfusion is a product intended for human consumption, just as much as a vaccine or a food product would be. The court added that "well settled law" made the manufacturer of a product intended for human consumption or intimate bodily use strictly liable to the consumer for injuries sustained as a result of a defect in the product.<sup>94</sup>

89. The court took into consideration the following factors: (1) the secondary container was readily available for inspection by the purchaser who had no need to rely on the bottler; (2) the carton was provided for convenience purposes and the purchaser was required to handle the container in order to use the product; and (3) the alleged defect is not of the type which is more likely than not to have existed before the product left the manufacturer's hands. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901, 904 (Fla. 4th Dist. 1973).

90. FLA. STAT. § 672.316(5) (1971).

91. *Rostocki v. Southwest Florida Blood Bank, Inc.*, 276 So. 2d 475 (Fla. 1973) [hereinafter referred to as *Rostocki*]; *Mercy Hosp., Inc. v. Benitez*, 257 So. 2d 51 (Fla. 3d Dist. 1972).

92. 276 So. 2d 475 (Fla. 1973).

93. The statute was enacted in 1969. Fla. Laws, 1969, ch. 69-157.

94. To like effect is *Mercy Hosp., Inc. v. Benitez*, 257 So. 2d 51 (Fla. 3d Dist. 1972). The court in *Rostocki* discussed the distinction between adulterated and unadulterated products:

There is a clear distinction between a product which is not adulterated—one which meets all the standards established for a particular product but which is attended with a known risk to the consumer—and a product which is, in fact, adulterated and

Florida has also held that a sale within the meaning of the Uniform Commercial Code occurs when a consumer obtains a product by purchasing a certain dollar amount of additional manufacturer's products.<sup>95</sup> Thus, in *Sheppard v. Revlon*,<sup>96</sup> the plaintiff sued a cosmetic manufacturer on grounds of negligence and breach of express and implied warranties. The plaintiff allegedly sustained injury to her left eye after using the manufacturer's wrinkle cream, which she obtained by purchasing five dollars or more of other cosmetics manufactured by the defendant. Relying on various sections of the Uniform Commercial Code,<sup>97</sup> the court found that the transaction constituted a sale. However, the court affirmed the directed verdict in favor of the manufacturer on the ground that the plaintiff failed to produce sufficient proof to establish a causal connection between the use of the wrinkle cream and the eye injury.

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defective—that is, which does not meet the standards established for this particular product—and which would, because of such unknown and undetectable defect, produce a harmful effect upon any consumer thereof.

*Rostocki v. Southwest Florida Blood Bank, Inc.*, 276 So. 2d 475, 477 (Fla. 1973). For an implied warranty case involving an unwholesome substance found in food products, see *Way v. Tampa Coca-Cola Bottling Co.*, 260 So. 2d 288 (Fla. 2d Dist. 1972), discussed in notes 23-25 *supra* and accompanying text.

See also *E.R. Squibb & Sons v. Stickney*, 274 So. 2d 898 (Fla. 1st Dist.), *cert. denied*, 285 So. 2d 414 (Fla. 1973) and *E.R. Squibb & Sons v. Jordan*, 254 So. 2d 17 (Fla. 1st Dist. 1971). Both cases were based on warranty and negligence theories. The suits were brought by plaintiffs who sustained injuries when allegedly unfit bone grafting material (known as Boplant) manufactured by the defendant was implanted in their bodies during orthopedic surgery. In *Stickney*, the plaintiff did not claim that the particular package of Boplant used in his operation was defective or became adulterated before leaving the manufacturer's hands. Rather, he contended that Boplant material was inherently defective and unfit in all forms for purposes of bone grafting. The court found the manufacturer not liable because the plaintiff had failed to show that his injury was caused by a defect in the product itself. A similar result was reached in *Jordan*, where the plaintiff contended that Boplant was unsafe and ineffective as transplant material for use in the human body. The applicable principle can best be stated that before liability will be imposed on the manufacturer, a defect in the product *actually used* on the plaintiff has to be found to exist at the time the product left the manufacturer's control, and that this defect must be a proximate cause of the plaintiff's injury.

95. *Sheppard v. Revlon, Inc.*, 267 So. 2d 662 (Fla. 3d Dist. 1972).

96. *Id.*

97. The Code defines a sale as "the passing of title from the seller to the buyer for a price . . ." UNIFORM COMMERCIAL CODE § 2-106(1); FLA. STAT. § 672.106(1) (1973).

The Code also provides that the "price of goods is payable in something other than money." UNIFORM COMMERCIAL CODE § 2-304, comment 2; FLA. STAT. ANNOT. § 672.2-304, comment 2.

Alternatively, the court reasoned that liability could be imposed even if the transaction was not a sale because warrantly responsibility is not limited to sales contracts or to the direct parties to a contract. Comment 2 to Uniform Commercial Code section 2-313 provides:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances . . . . Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

UNIFORM COMMERCIAL CODE § 2-313, comment 2; FLA. STAT. ANNOT. § 672.2-313, comment 2; *quoted in Sheppard v. Revlon, Inc.*, 267 So. 2d 662, 664 (Fla. 3d Dist. 1972).

The question of privity was involved in *Marrillia v. Lyn Craft Boat Co.*<sup>98</sup> The plaintiff was a guest passenger on a boat sold by one defendant and manufactured by the other. Plaintiff sustained injuries when the steering cable broke, causing the boat to overturn suddenly and to throw him off into the water. The plaintiff sued both the retailer and the manufacturer on theories of negligence and breach of implied warranty. The court held that in the absence of privity between the plaintiff and the retailer, the latter could not be held liable unless the boat in question could be categorized as a dangerous instrumentality at the time of the accident.<sup>99</sup> The complaint did state a cause of action against the manufacturer because "privity no longer obtains in an implied warranty suit by a consumer against a manufacturer."<sup>100</sup>

Other Florida cases involving only economic loss from defective property have treated the problem of exclusion of warranties. For instance, cases involving the sale of defective automobiles have held that the critical requirement to exclude or modify implied warranties of merchantability or fitness is that the language used must be set forth in a conspicuous manner in the contract of sale.<sup>101</sup> Conspicuousness generally requires that the wording be printed or typed in bold face, and not in the same color of ink or same size of type as other provisions in the contract.<sup>102</sup>

### I. *The Family*

In *Vinci v. Gensler*,<sup>103</sup> the court relied on the authority of *Orefice v. Albert*<sup>104</sup> to re-affirm, without opinion, the doctrine of interspousal and parental immunity in Florida. There was, however, a dissenting opinion by one member of the court. The dissent disclosed that in *Vinci* an entire family was killed in an airplane crash, allegedly caused by the negligent piloting of the aircraft by the deceased father. The plaintiff was the personal representative of the estates of his wife and two minor children, who were passengers on the plane. The dissent voiced strong opposition to the doctrine. Since the historical reason for the rule was the maintenance of family unity and harmony, and since no family member had

98. 271 So. 2d 204 (Fla. 2d Dist. 1973).

99. *Id.* at 206-07.

100. *Id.* at 207 quoting from *Bernstein v. Lily Tulip Cup Corp.*, 177 So. 2d 362, 364 (Fla. 3d Dist. 1965).

101. *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. 2d Dist.), *cert. denied*, 267 So. 2d 833 (Fla. 1972), *noted at* 27 U. MIAMI L. REV. 247 (1972); *Orange Motors v. Dade County Dairies*, 258 So. 2d 319 (Fla. 3d Dist.), *cert. denied*, 263 So. 2d 831 (Fla. 1972), *noted at* 26 U. MIAMI L. REV. 648 (1972).

102. Cases cited note 101 *supra*. See *Coleman v. American Universal, Inc.*, 264 So. 2d 451 (Fla. 1st Dist. 1972), treating the question of whether the defense of contributory negligence or the defense of misuse is available in actions for breach of implied warranty. Interestingly, the court in *Coleman* overlooked the fact that a lease, rather than a sale, was involved.

103. 269 So. 2d 20 (Fla. 2d Dist. 1972) [hereinafter referred to as *Vinci*].

104. 237 So. 2d 142 (Fla. 1970).

survived the crash, the reason for the rule was absent as applied to this particular factual situation. Further, the dissent argued that, in general, the rule was outmoded and had outlived its usefulness.<sup>105</sup>

In *Webb v. Allstate Insurance Co.*,<sup>106</sup> the court also relied on *Orefice v. Albert*<sup>107</sup> to hold that an unemancipated minor child may not sue his parent for injuries arising from the parent's negligence.<sup>108</sup>

In *LaMonte v. De Diego*,<sup>109</sup> the District Court of Appeal, Second District, confronted the question of whether the wife's negligence in driving an automobile, which is jointly owned by the wife and husband, will be imputed to the husband, a passenger in the car, merely by virtue of the marriage relationship. The court answered the question in the negative. However, it added one caveat: A distinction is to be drawn between situations in which liability is sought to be imposed upon an owner or co-owner, as opposed to situations in which the owner seeks recovery from a negligent party. The latter was the situation before the court. The court also relied on the decision in *Hammack v. Veillette*<sup>110</sup> and on the view taken by the Second Restatement of Torts,<sup>111</sup> both of which espouse recovery.

In *Southern American Fire Insurance Co. v. Maxwell*,<sup>112</sup> the District Court of Appeal, Third District, dealt with the question of a parent's liability for the torts of his minor child. A five year old girl was permitted to ride a bicycle purportedly without the supervision of her parents. She struck the seventy-nine year old plaintiff, who brought a negligence action against the parents and the daughter. After announcing adherence to "well established law that a parent is not liable for the tort of his minor child"<sup>113</sup> merely by virtue of his paternity, the court proceeded to enumerate the various exceptions to this rule. Parental liability will be incurred where: (1) the parent entrusts the child with an instrumentality which may become a source of danger to others in light of the child's age, judgment, and experience; (2) there is an agency relationship between

105. *Vinci v. Gensler*, 269 So. 2d 20, 21 (Fla. 2d Dist. 1972) (dissenting opinion).

106. 258 So. 2d 840 (Fla. 3d Dist. 1972) [hereinafter referred to as *Webb*].

107. 237 So. 2d 142 (Fla. 1972).

108. In *Webb*, a nine-year-old child sued his father for personal injuries sustained on account of the parent's alleged negligent driving. The boy was injured as a passenger in the automobile driven by his intoxicated father.

109. 274 So. 2d 254 (Fla. 2d Dist.), *cert. denied*, 279 So. 2d 873 (Fla. 1973) [hereinafter referred to as *LaMonte*]. The parties stipulated as to the wife's negligence. Thus, the sole issue before the court was that of imputed negligence.

110. 233 So. 2d 836 (Fla. 3d Dist. 1970).

111. "The negligence of husband or wife does not bar the other spouse from recovery for his or her own physical harm." RESTATEMENT (SECOND) OF TORTS § 487 (1965). Other factors determinative in the court's ruling were that: (1) there was no proof of joint control (the husband was legally blind and did not hold a driver's license); (2) there was no proof of an agency relationship between the parties; (3) the husband's claim was not derivative; and (4) the case did not involve a claim for damages to which the husband and wife are indivisibly entitled. *LaMonte v. De Diego*, 274 So. 2d 254, 255 (Fla. 2d Dist. 1973).

112. 274 So. 2d 579 (Fla. 3d Dist.), *cert. denied*, 279 So. 2d 32 (Fla. 1973) [hereinafter referred to as *Maxwell*].

113. *Id.* at 580.



the child and his parents; (3) the parent has knowledge of the child's wrongdoing and either consents to it, directs it or sanctions it; and (4) the parent fails to exercise his parental control over the minor child, although in the exercise of due care the parent should have known that injury to another was a probable consequence.<sup>114</sup> After holding the first three exceptions inapplicable, the court stated that the question of liability hinged "on the broad basis of whether or not the parent . . . [had failed] to exercise due care in the circumstances."<sup>115</sup> This, the court felt, was a question for the jury rather than a question of law.

In *Yordon v. Savage*,<sup>116</sup> a minor child and his parents brought a negligence action against the child's pediatrician. Both of the parents individually sought damages for medical expenses, loss of their child's services and mental pain and suffering. The defendant pediatrician filed a motion to strike the child's mother as an improper party, which the court granted.<sup>117</sup> The Supreme Court of Florida reversed the trial court's order, holding that the cause of action "is available to *either* the father *or* the mother, *or* to the two parents together."<sup>118</sup> The court added that in suits of this type, both parents are necessary parties. As such, the cause of action requires that where one parent files personally, he or she must either (a) file as trustee for the other, or (b) name the non-participating parent as a party defendant in cases where service of process may be perfected. In addition, if special circumstances so require, the trial court may in its discretion name a guardian ad litem to protect the interests of the non-filing parent.<sup>119</sup> The court concluded that in actions of this type

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114. *Id.*

115. *Id.* at 581. The court held that it was proper to submit the case to the jury to determine whether or not the parents had failed to exercise their parental duty, namely, whether they had failed to make certain that the child was competent to control the bicycle without supervision.

116. 279 So. 2d 844 (Fla. 1973).

117. The plaintiff mother opposed the motion to strike with a number of constitutional objections, namely, that she had been denied due process and equal protection under both the federal and state constitutions by virtue of being discriminated against on the basis of sex. As the mother of the minor child, she claimed that she was the parent who had been and would be taking care of the child.

118. *Yordon v. Savage*, 279 So. 2d 844, 846 (Fla. 1973) (emphasis in original). The court alluded to its previous ruling in *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (1926), where it held that the parent or guardian of an unemancipated minor child, injured by a third person's tortious act, had a cause of action in his own name for medical, hospital and related expenses, for indirect economic losses (such as income lost by the parent in caring for the child), and for the loss of the child's companionship, society and services. In *Yordon*, the court changed its position by holding that the cause of action is in either or both of the parents.

With respect to the constitutional arguments, the court agreed that the import of the constitutional provisions made discrimination on the basis of sex impermissible. In the eyes of the law, both are equal; therefore, the cause of action may not lie in only one parent. *Yordon v. Savage*, 279 So. 2d 844, 846-47 (Fla. 1973).

119. The court set forth the proper procedure to be followed where one parent receives a judgment as trustee for the other. All such trusts funds should be paid into the registry of the court to be then turned over to the nonparticipating parent, or "used for such lawful purposes as the justice of the case may require." *Yordon v. Savage*, 279 So. 2d 844, 847 (Fla. 1973).

the jury, or the judge sitting as a trier of fact, "shall apportion the proceeds of the judgment to one or both parents as may seem just, based upon the social and economic relationships of the parties to the children."<sup>120</sup>

## J. *Automobiles*

### 1. THE DANGEROUS INSTRUMENTALITY DOCTRINE

If an automobile owner has not given his express or implied consent to the operation of his car by another, he will not be vicariously liable for injuries resulting to a third person from the driver's negligence. The same principle applies where he has expressly revoked any authority he had previously given to the driver.<sup>121</sup> In *Martinez v. Hart*,<sup>122</sup> the owner had given his consent to the driver to operate his car. Subsequently, the latter's driver's license was revoked. Thus, approximately two months before the accident in question, the owner withdrew his consent and expressly prohibited the driver from using the car. In violation of the owner's express prohibition, the driver drove the car and collided with the plaintiff's vehicle, causing injury and damages. The court reiterated the doctrine that in Florida an automobile is a dangerous instrumentality. Therefore, an owner who has knowledge of, or gives his express or implied consent to the operation of his car by another is liable for injuries negligently caused to a third person. However, the court relieved the defendant owner of any liability because of his express prohibition to the driver not to operate the car without a valid driver's license. In addition, the court noted that liability would not be imposed because of the driver's knowledge that he was driving the car without the owner's consent.<sup>123</sup>

Following the same line of reasoning, the District Court of Appeal, Second District, in *Ray v. Earl*,<sup>124</sup> stated that implied consent will be found in cases where the facts do not disclose any express limitation or lack of authority. Further, the court observed that this principle applies even in those cases where the original permittee has delegated his right to drive the car to a second permittee, particularly in cases where the original permittee is a passenger in the car. Thus, since the dangerous instrumentality doctrine is based on strict agency and respondeat superior principles, the negligence of the second permittee will still be imputed to the owner.<sup>125</sup>

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120. *Id.*

121. *Martinez v. Hart*, 270 So. 2d 438 (Fla. 3d Dist. 1972).

122. *Id.*

123. *Id.* at 440.

124. 277 So. 2d 73 (Fla. 2d Dist. 1973), *cert. denied*, 280 So. 2d 685 (Fla. 1973) [hereinafter referred to as *Ray*].

125. In *Ray*, the owner gave his original permittee consent to drive the car. In turn, the latter allowed a third party, the second permittee, to drive it. With the original permittee as a passenger, he was involved in a collision which resulted in his death and injuries to the original permittee.

## 2. THE NO-FAULT LAW

In 1971, Florida made a drastic change in the area of tort law. The Florida legislature supplanted tort liability based on fault with a scheme of no-fault legislation covering motor vehicle accident cases.<sup>126</sup> The full provisions of the new law took effect on January 1, 1972 and require Florida motor vehicle owners to carry appropriate insurance protection, as defined in the Act.<sup>127</sup> If the owner is covered by the mandatory personal injury protection, he will be exempt from tort liability for bodily injuries unless one of the following thresholds is met: (1) the medical liability for personal injury exceeds \$1,000; or (2) the injury involves permanent disfigurement, a fracture of a weight-bearing bone, a compound, comminuted, displaced, or compressed fracture, the loss of a bodily member, a permanent injury, the permanent loss of a bodily function, or death.<sup>128</sup>

Generally, a personal injury claimant may recover up to \$5,000 in no-fault benefits regardless of who is at fault. If the claim does not meet one of the thresholds, then the personal injury protection benefits are exclusive and the owner is not subject to tort liability. If, however, the claim reaches one of the thresholds, then the claimant is entitled to collect both the personal injury protection benefits and to bring suit against the tortfeasor. If tort recovery is obtained, then the party who made the payments is entitled to reimbursement.<sup>129</sup>

## K. Defenses

### 1. COMPARATIVE NEGLIGENCE<sup>130</sup>

In the important case of *Hoffman v. Jones*,<sup>131</sup> the Supreme Court of Florida abolished the defense of contributory negligence and adopted the pure form of comparative negligence in its stead. The court justified its departure from the long-standing contributory negligence rule by reasoning that the principle was a "harsh" one and that it had outlived

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Florida's guest statute, FLA. STAT. § 320.59 (1971) was repealed on February 14, 1972. See Fla. Laws, 1972, ch. 72-1.

126. FLA. STAT. §§ 627.730-.741 (1971).

127. FLA. STAT. § 727.733 (1971). The mandatory personal injury protection liability includes coverage for medical, hospital, and other health-related expenses, to a maximum of \$5,000. Liability for funeral expenses to a limit of \$1,000 is also included in the required personal injury protection. FLA. STAT. § 627.736 (1971).

128. FLA. STAT. 627.737 (1971). The Florida law included no-fault property damage provisions. FLA. STAT. § 627.738 (1971). But see *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (decided subsequent to the survey period), holding unconstitutional the property damage provisions of the act.

129. FLA. STAT. §§ 627.736-.737 (1971).

130. For a detailed analysis of comparative negligence, see Comment, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. \_\_\_\_ (1974).

131. 280 So. 2d 431 (Fla. 1973), modifying 272 So. 2d 529 (Fla. 4th Dist.). This case is noted at 28 U. MIAMI L. REV. 473 (1974).

its usefulness.<sup>132</sup> The principle of *Hoffman v. Jones* may be simply stated as follows: If the negligence of both the plaintiff and the defendant were legally contributing causes of the plaintiff's injury, the jury must apportion the damages suffered by apportioning the degrees of negligence of the parties. The plaintiff is awarded such damages as the defendant's negligence *caused* him. To illustrate the principle, the court gave the following example:

[L]et us assume that a plaintiff is 80 percent responsible for an automobile accident and suffers \$20,000 in damages, and that the defendant—20 percent responsible—fortunately suffers no damages. The liability of the defendant in such a case should not depend upon what damages he *suffered*, but upon what damages he *caused*. If a jury found that this defendant had been negligent and that his negligence, in relation to that of the plaintiff, was 20 percent responsible for causing the accident then he should pay 20 percent of the total damages, regardless of the fact that he has been fortunate enough to not be damaged personally.<sup>133</sup>

The court cautioned, however, that before the principle will apply, the negligence of *both* the plaintiff and the defendant must be contributing causes. Stated otherwise, a plaintiff is still entirely barred from recovery if his own negligence, or that of a third person other than the defendant, is the *sole* legal cause of the injury or damage.<sup>134</sup>

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132. The court stated:

Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

*Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973).

The court explained that the original reasons for the rule were no longer valid in that contributory negligence was adopted to further and protect the growth of industries, whereas "[m]odern economic and social customs . . . favor the individual, not industry." *Id.* at 437. Further, the court found that the other justifications for the rule were no longer present.

133. *Id.* at 439 (emphasis in original). The court authorized the use of special verdicts so that the true intent of the jury would be reflected. For example, where both parties are negligent, the defendant will usually file a counterclaim. The defendant will be entitled to a verdict award representing only that proportion of the total damages he sustained as a proximate result of solely the plaintiff's negligence. Since two verdicts could result, namely, one for the plaintiff and one for the defendant cross-plaintiff, then only one judgment should be entered in favor of the party who received the larger verdict. The amount of the judgment would be the difference between the two verdicts.

134. The court expressly noted that the doctrine of last clear chance would clearly have no application to future cases. The court, however, refused to discuss or consider the effect that the principle of *Hoffman v. Jones* would have on the concepts of assumption of risk and the lack of contribution between joint tortfeasors. As one of its reasons for declining to discuss those issues, the court pointed to the body of comparative negligence case law existing in Florida under the earlier railroad statute, concluding: "Much of this case law will be applicable under the comparative negligence rule we are now adopting generally." *Id.* at 439.

## 2. ASSUMPTION OF THE RISK

In *Acosta v. Daughtry*,<sup>135</sup> the twenty year old defendant pointed a revolver at his sixteen year old friend and pulled the trigger, without, however, first assuring himself that the gun was unloaded. The plaintiff sustained a bullet wound in his chest. Both boys were quite familiar with firearms. The defendant's father had given him the revolver to see if the boy could fix it. Apparently, the plaintiff willingly offered to help the defendant. The defendant, however, was unaware of the fact that the plaintiff had reloaded the gun and the plaintiff failed to tell him that he had done so. The District Court of Appeal, Third District, reversed the judgment for the defendant entered upon a jury verdict, finding that the plaintiff had not assumed the risk. The court noted that voluntary exposure and appreciation of the danger are essential elements of the defense. Thus, the court concluded that "not by the wildest stretch of the imagination" could it be said that the plaintiff willingly exposed himself to the risk that his twenty year old friend, skilled in the handling of guns, would point a revolver at him and pull the trigger.<sup>136</sup>

*Evans v. Green*<sup>137</sup> also involved an accidental shooting between two young boys. The District Court of Appeal, First District, held, however, that the existence of assumption of risk was a question of fact properly submitted to the jury and affirmed the judgment in favor of the defendant. In *Evans*, the fifteen year old defendant and the fourteen year old plaintiff had been hunting together and were walking back home. The plaintiff discharged his gun to shoot a bird and ran in front of the defendant to retrieve it. At this point, the minor defendant accidentally discharged his gun and injured the plaintiff in the leg. The court stated that assumption of the risk "involves a deliberate choice to risk a known danger."<sup>138</sup> Under the facts of the case, it was possible that the plaintiff had assumed the risk; therefore, the issue was properly a jury question.

In *DePew v. Sylvia*,<sup>139</sup> the plaintiff took his children to an amusement park and purchased tickets for a "jet slide" ride. The plaintiff was injured when he dropped approximately four feet to the ground while sliding down the amusement device. The lower court entered judgment in favor of the plaintiff upon a jury verdict. Although the plaintiff testified that the slide looked very high, but that he nevertheless went on it be-

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135. 268 So. 2d 416 (Fla. 3d Dist. 1972), *cert. denied*, 277 So. 2d 788 (Fla. 1973).

136. The court pointed out that a charge on assumption of the risk should be given only where the jury may find that the plaintiff more or less deliberately and willingly exposed himself to the specific risk of danger. In addition, the court noted that the twenty-year-old defendant should have required no warning to the effect that a gun's trigger should never be pulled without first making sure that the weapon is unloaded. However, the court did affirm the judgment entered in favor of the defendant father.

137. 251 So. 2d 318 (Fla. 1st Dist.), *cert. denied*, 253 So. 2d 706 (Fla. 1971) [hereinafter referred to as *Evans*].

138. *Id.* at 319.

139. 265 So. 2d 75 (Fla. 1st Dist. 1972).

cause he did not want his children to think him "chicken," the District Court of Appeal, Third District, affirmed the judgment, holding that the defense of assumption of risk was not available to the defendant. "An amusement device is designed to provide thrills without providing injury."<sup>140</sup>

Similarly, in *Blankenship v. Davis*,<sup>141</sup> the plaintiff was injured while sliding down a sliding board maintained by the defendant motel for the entertainment of its guests. The slide extended out into shallow water, but the plaintiff did not attempt to determine the depth of the water. No warning signs were posted to the effect that the water was shallow or that it might be dangerous for adults to use the sliding board. The lower court entered judgment for the defendant pursuant to a jury verdict. The District Court of Appeal, First District, reversed, ruling that before assumption of the risk may bar the plaintiff's action for personal injuries, there must be substantial evidence showing that the plaintiff had actual knowledge and a conscious appreciation of the particular risk involved. Further, the plaintiff must have voluntarily exposed himself to the danger.<sup>142</sup>

#### L. *Wrongful Death and Survival Actions*

The Florida legislature recently made a major revision of the entire area concerning death acts. The new Florida Wrongful Death Act<sup>143</sup> vests the cause of action for wrongful death in the decedent's personal representative, who recovers all damages for the benefit of both the decedent's survivors and his estate.<sup>144</sup>

The new act deviates in many respects from the old one. Among other considerations, it poses the serious question of whether the separate survival action<sup>145</sup> was rendered inoperative at least in those instances where an action for wrongful death may be brought under the new statute.<sup>146</sup> Although the survival statute has not been officially repealed by the legislature and, therefore, remains on the statute books, the new

140. *Id.* at 77. The court noted that uncontroverted evidence showed that the plaintiff had never seen this type of amusement device prior to the date of the accident. *Id.* at 76.

141. 251 So. 2d 141 (Fla. 1st Dist.), *cert. denied*, 257 So. 2d 258 (Fla. 1971).

142. There was no evidence that even "remotely suggested" that the plaintiff knew or should have known of the danger created by the shallow depth of the water underneath the slide or that she voluntarily exposed herself to that danger. *Id.* at 144.

143. FLA. STAT. §§ 768.16-27 (Supp. 1972), *repealing* FLA. STAT. §§ 768.01-.03 (1971).

144. FLA. STAT. § 768.20 (Supp. 1972). The decedent's survivors are defined in the statute to include the decedent's spouse, his minor children, his parents and when dependent upon the decedent for support, any other blood relatives and adoptive brothers and sisters. Survivors also include the illegitimate child of a mother, but not that of a father unless he has recognized a responsibility for the child's support. FLA. STAT. § 768.18(1) (Supp. 1972).

145. The survival act is contained in Florida Statutes section 46.021 (1971), which provides: "No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law."

146. An action under the new Wrongful Death Act may be brought whenever "the death of a person is caused by [a] wrongful act, negligence, default, or breach of contract or warranty . . . ." FLA. STAT. § 768.19 (Supp. 1972).

Wrongful Death Act provides: "When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate."<sup>147</sup> Additionally, many of the elements of damages previously recoverable under the survival statute are now incorporated into the Wrongful Death Act. For instance, damages for lost support and services, loss of companionship, the mental pain and suffering of survivors and loss of earnings of the deceased are compensable *from the date of the injury* rather than from the date of death. Further, medical and funeral expenses, previously compensable in a survival action, are now recoverable under the new statute.<sup>148</sup> In conclusion, various factors, such as (1) the detailed specification of damages recoverable; (2) the express language referring to abatement of actions; and (3) the fact that many of the elements of damages are now compensable from the date of the injury, may evidence a legislative intent to merge the two actions—wrongful death and survival—into one. The net effect would be to render the survival statute inoperative when the Wrongful Death Act applies.<sup>149</sup>

The stated legislative intent of the new act purports "to shift the losses when wrongful death occurs from the survivors of the decedent to the wrongdoer."<sup>150</sup> In addition, the act is "remedial" in nature and is to be "liberally construed."<sup>151</sup>

## II. STRICT LIABILITY: ANIMALS

In *Isaacs v. Powell*,<sup>152</sup> the District Court of Appeal, Second District, made the strict liability doctrine applicable to owners or keepers of wild animals. An owner or keeper of a wild animal will thus be liable to one injured by the animal regardless of any fault on his part. In *Isaacs*, the defendant kept a chimpanzee on his monkey farm. After having purchased an admission ticket and some food to feed the animal (a practice encouraged by the defendant), the chimpanzee grabbed the arm of the plaintiff's son, seriously injuring him. In his suit, the plaintiff relied solely on principles of strict liability. The question was one of first impression in Florida. The Second District thus phrased the issue before it: Whether

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147. FLA. STAT. § 768.20 (Supp. 1972).

148. FLA. STAT. § 768.21 (Supp. 1972). For a comprehensive discussion of the damages recoverable under the new act and their method of computation, see Wilcox & Melville, *The Computation of Damages under the New Florida Wrongful Death Act*, 26 U. MIAMI L. REV. 737 (1972).

149. There is no provision in the new statute for recovery of the decedent's own mental pain and suffering to date of death, an element of damages previously recoverable in a survival action. Thus, if the survival action was, in fact, eliminated by the new act, it would appear that this particular item of damages would no longer be recoverable. The survivors may now recover for their own mental pain and suffering from date of injury, as specified in the Act. Another question raised by the new statute is whether punitive damages may be recovered in a proper case under the new Wrongful Death Act.

150. FLA. STAT. § 768.17 (Supp. 1972).

151. *Id.*

152. 267 So. 2d 864 (Fla. 2d Dist. 1972) [hereinafter referred to as *Isaacs*].

Florida should adopt the strict liability doctrine for injuries inflicted by wild animals or whether liability should be predicated on the negligence of the owner. In deciding in favor of the strict liability rule, the court's reasoning was two-fold. First, policy considerations require that strict responsibility be placed upon those who expose the community to the risk of a serious danger, even though they may be exercising due care. Second, the court alluded to Florida Statutes section 767.04,<sup>153</sup> which imposes strict liability on a dog owner. The court observed:

It would result in a curious anomaly, then, if we were to adopt the negligence concept as a basis for liability of an owner or keeper of a tiger, while § 767.04 . . . imposes potential strict liability upon him if he should trade the tiger for a dog.<sup>154</sup>

The court also discussed the defenses which would be available under the new rule.<sup>155</sup> Fault on the plaintiff's part which is akin to contributory negligence will not relieve the owner from liability. Only that degree of fault which approximates assumption of the risk will constitute a defense to the action.<sup>156</sup> The willful or intentional act of a third party<sup>157</sup> will also relieve the owner from liability when it is the sole cause of the injury.

In *Rutland v. Biel*,<sup>158</sup> the court construed section 767.01 of the Florida Statutes (1971), which provides that dog owners will be liable for any damage done by their dogs to other animals or to persons. For the first time, the court ruled that the statute is inapplicable to situations where the dog takes no affirmative or aggressive action toward the injured party. In *Rutland*, the seventy-six year old plaintiff was a guest at the defendant's house, and, while in the living room, heard a dog yelp, looked down and saw the dog. She took a step backward, tripped over the dog, then fell and injured herself. The court reversed the lower court's partial summary judgment for the plaintiff, holding that there was an issue of fact as to whether or not the plaintiff had assumed the risk.<sup>159</sup> In

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153. The statute provides in pertinent part: "The owners of any dog which shall bite any person . . . shall be liable for such damages as may be suffered by persons bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness." FLA. STAT. § 767.04 (1973). Pursuant to the statute, the defendant may escape liability in only two ways: (1) if the injured person "mischievously or carelessly provoke[s] or aggravate[s]" the dog inflicting the injury; or (2) if the owner displays in a prominent place on his property a warning sign which may be easily read and which includes the words "Bad Dog." FLA. STAT. § 767.04 (1973).

154. *Issacs v. Powell*, 267 So. 2d 864, 866 (Fla. 2d Dist. 1972).

155. The court cautioned that strict liability did not mean that the owner or keeper would be an absolute insurer in all instances.

156. The court specifically adopted the rule set forth in the RESTATEMENT OF TORTS § 515 (1938). To similar effect is the rule set forth in the RESTATEMENT (SECOND) OF TORTS § 484 (1965).

157. The court noted that possibly the conduct of the boy's father in *Isaacs* might operate to relieve the owner from liability, if the jury were to so determine.

158. 277 So. 2d 807 (Fla. 2d Dist. 1973) [hereinafter referred to as *Rutland*].

159. The court observed that while the liability of the dog owner under the statute had been held to be absolute liability, such as that of an insurer, assumption of the risk and proximate cause were permissible defenses.



addition, the court noted that in all earlier cases decided pursuant to the statute, the dog had acted aggressively; however, in *Rutland* the dog had not taken any affirmative action.

### III. INTENTIONAL TORTS

#### A. *Assault and Battery*

The intent required for an assault and battery is merely knowledge on the part of the defendant that a particular result is "substantially certain" to follow from his acts. A hostile intent is not necessary, and neither is an intent or desire to do harm required.<sup>160</sup> In *Spivey v. Battaglia*,<sup>161</sup> the Supreme Court of Florida found that knowledge and appreciation of a risk which falls short of a "substantial certainty" is not tantamount to intent. If the knowledge on the part of the defendant fails to reach that threshold, as, for example, if the defendant has knowledge of merely a foreseeable risk of harm, then only negligence may arise. "Thus, the distinction between intent and negligence boils down to a matter of degree."<sup>162</sup> *Spivey* involved what the court described as a "friendly unsolicited hug." Knowing that the plaintiff was shy, the defendant nonetheless threw his arms around her and pulled her head toward him. Immediately, the plaintiff felt a sharp pain in the back of her neck and ear. The left side of the plaintiff's face and her mouth consequently became paralyzed. The court ruled that the requisite intent for assault and battery was lacking, stating that a reasonable man in the defendant's position would not believe that such "bizarre" results were "substantially certain" to follow.<sup>163</sup>

In *Jennings v. City of Winter Park*,<sup>164</sup> the court discussed the standard of care imposed upon legal officers in making an arrest. A police officer may use only that force which is reasonably necessary to effect the arrest. If the officer uses more force than is required, then he is no longer privileged and will be liable for the use of excessive force. In *Jennings*, a sixty-eight year old attorney was involved in a quarrel with a police officer over a traffic violation. There was contradictory evidence with respect to the details of the incident, but the facts clearly showed that in order to arrest the plaintiff, the officer threw blasts of mace at his face from a short distance. Thereafter, the plaintiff developed eye difficulties. After the arrest the plaintiff was not instructed to wash his eyes, although there was some evidence that immediate flushing of the

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160. *Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972) [hereinafter referred to as *Spivey*]. The court relied on RESTATEMENT (SECOND) OF TORTS § 8A (1965).

161. 258 So. 2d 815 (Fla. 1972).

162. *Id.* at 817.

163. The court distinguished *McDonald v. Ford*, 223 So. 2d 553 (Fla. 2d Dist. 1969), which involved unsolicited kissing. The court noted that in *McDonald* a certain degree of struggling between the plaintiff and the defendant had been involved, a factor absent in *Spivey*.

164. 250 So. 2d 900 (Fla. 4th Dist. 1971) [hereinafter referred to as *Jennings*].

eyes is the proper treatment following the use of mace. The District Court of Appeal, Fourth District, nonetheless ruled that, notwithstanding the apparent effect of the mace, the force employed was not unreasonable or excessive. The court went further to state that if mace had not been used, a more dangerous force might have been necessary to make the arrest.<sup>165</sup>

### B. False Imprisonment

In *City of Hollywood v. Coley*,<sup>166</sup> the court ruled that in an action for false imprisonment<sup>167</sup> against legal officers, the burden of proving that the defendants lack arrest powers is on the plaintiff, and such proof is an element of the cause of action.<sup>168</sup> Thus, if there is no proof that the defendant is without authority to arrest, the plaintiff must show that the restraint was unreasonable and unwarranted by the circumstances. In *Coley*, the plaintiff, a general contractor, was using certain building materials allegedly in violation of the county building code. After asking the plaintiff to stop the project in order to correct the deficiency, two building inspectors placed the plaintiff under arrest with the assistance of a police officer. There was conflicting evidence as to whether or not the plaintiff had evidenced an intent to disobey the order. The plaintiff was held in the police station for a period of three hours and was released only after submitting to fingerprinting. In view of the disputed evidence, the District Court of Appeal, Fourth District, affirmed the lower court's judgment for the plaintiff, ruling that it was proper for the jury to consider whether or not the detention was reasonable under the circumstances.<sup>169</sup>

In *Jennings v. City of Winter Park*,<sup>170</sup> police records disclosed that the plaintiff was detained in the police station for one hour and five minutes. The court reiterated the principle that where the arrest is lawful, civil liability for false imprisonment hinges on a showing that the detention was unreasonable and not warranted by the circumstances. In affirm-

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165. The court did not find error in the lower court's refusal to instruct the jury that in making an arrest, an officer is not privileged to use force that may produce serious bodily harm to a citizen. This charge is based upon the premise that it is better to allow a petty offender to escape than to do him great bodily harm.

166. 258 So. 2d 828 (Fla. 4th Dist. 1971) [hereinafter referred to as *Coley*].

167. The tort of false imprisonment is sometimes referred to as false arrest.

168. The court noted that the sole evidence offered by the plaintiff on the question of lack of authority to arrest was the testimony of a retired chief building inspector, who testified that he had never heard of any arrests made by building inspectors during his fourteen year period of employment with the building department. Further, the plaintiff relied on the testimony of the defendant inspectors to the effect that they had not received any police training in the area of arrest and detention of crime suspects. The court held that the evidence was insufficient to meet the plaintiff's burden of proof that the defendants did not possess authority to arrest.

169. *City of Hollywood v. Coley*, 258 So. 2d 828, 832 (Fla. 4th Dist. 1971). Malice is not an element of the tort of false imprisonment. *Id.* at 833.

170. 250 So. 2d 900 (Fla. 4th Dist. 1971).

ing a verdict for the defendant, the court ruled that the jury had properly determined that a restraint for a period of one hour and five minutes was reasonable for purposes of booking the plaintiff.

### C. *Fraud and Misrepresentation*

Where the seller does not attempt to deceive the purchaser and where both have equal access to the means of knowledge and to an inspection of the subject matter, the purchaser has no right to rely on the seller's statements. But if the purchaser is fraudulently induced to refrain from making an independent investigation by virtue of the seller's statement of opinion, it is immaterial that a reasonable inspection would have disclosed that the representation was untrue. Additionally, where the seller deceives the purchaser by concealing a defective condition, rendering it incapable of detection from ordinary inspection, the purchaser may recover damages in a fraud action arising out of the sale of real estate.<sup>171</sup> *Walker v. Mebane*<sup>172</sup> involved the sale of a house heavily damaged by termites. The seller represented to the purchasers that the house was in perfect condition and was free of termites. In fact, the house had a history of termite damage, which the seller was well aware of. The seller had attempted to repair the damage. These repairs, which consisted of the installation of aluminum siding, concealed all visible evidence of termite damage.<sup>173</sup> Stating that the rules set forth above applied to cases of fraud in the sale of termite-damaged houses, the court ruled that genuine issues of material fact required reversal of summary judgment for the seller.<sup>174</sup>

A plaintiff states a cause of action for common law deceit, such as fraud in the inducement, even if the cause of action is based on contractual promises or statements of present intention to render some future performance. That the representation does not relate to some existing matter does not deprive the plaintiff of his cause of action.<sup>175</sup> Thus, in *Ashland Oil, Inc. v. Pickard*<sup>176</sup> the court ruled that the plaintiff had prop-

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171. *Walker v. Mebane*, 279 So. 2d 386 (Fla. 4th Dist. 1973).

172. *Id.*

173. The court noted, however, that the purchasers had not been denied access to the house and, had they desired, they could have inspected the underneath of the house. Such inspection would have immediately revealed the termite damage.

174. Issues of fact included: (1) whether the seller had deceived the purchasers by concealing the termite damage and making it incapable of detection from an inspection; (2) whether the purchaser was required to "crawl" underneath the house in order to make a reasonable inspection; and (3) whether the seller's statements were made for the purpose of, and did actually induce the purchasers to refrain from making the inspection.

See also *First Nat'l Bank v. Jackson*, 267 So. 2d 697 (Fla. 4th Dist. 1972), also involving an action for damages based on fraud in the sale of real estate. In that case, however, the court reversed the lower court's judgment for the purchaser. The defendant allegedly induced the plaintiff to enter into a contract for the purchase of certain lots, stating that the property was high and dry, when in fact it was low and wet. There was, however, no evidence that the defendant had made any representations to the purchaser *prior* to his signing the contract in question.

175. *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714 (Fla. 3d Dist. 1972), *cert. denied*, 285 So. 2d 18 (Fla. 1973).

176. *Id.*

erly alleged and proved the elements of the tort. The plaintiff claimed that the defendants had fraudulently formulated a scheme to cause the plaintiff to rely on representations that he would have the first right to outfit and sell the fiberglass hulls manufactured by one of the defendants. In turn, the defendants could benefit from the plaintiff's expertise in outfitting the hulls. However, the defendants instead secretly prepared to outfit the vessels themselves, thus deceiving the plaintiff.<sup>177</sup>

The quantum of proof required in a fraud action is proof by a preponderance of the evidence and, therefore, the evidence need not reach the threshold of clear and convincing proof.<sup>178</sup>

#### D. Defamation: Libel and Slander

The doctrine of *New York Times Co. v. Sullivan*<sup>179</sup> states in essence that a public official may recover in libel for defamatory statements concerning the performance of his public duties only by proving knowledge of the falsity of the publication or reckless disregard for its truth.<sup>180</sup> The principle has been steadily expanded by the United States Supreme Court.<sup>181</sup> This constitutional privilege afforded the news media in the performance of their duty of keeping the public informed reached a high plateau when the same criteria were held applicable to events of great public concern.<sup>182</sup>

In *Firestone v. Time, Inc.*,<sup>183</sup> Florida was recently called upon to

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177. Plaintiffs could recover both out-of-pocket expenses in setting up the business as well as loss of profits on sales. While noting that this would ordinarily constitute impermissible double recovery, the court nonetheless stated that such an award is proper where the plaintiff sues in both deceit (fraud) and breach of contract. Thus, the defrauded party may elect to stand by the contract while at the same time suing in fraud for damages. The breach of contract constitutes a second wrong which gives rise to a separate and distinct cause of action; a recovery on one of the causes of action will not bar a subsequent action on the other. *Id.* at 723.

178. *Wedell v. Bill Kelley Chevrolet*, 251 So. 2d 145 (Fla. 4th Dist. 1971).

179. 376 U.S. 254 (1964) [hereinafter referred to as *New York Times*].

180. *Id.* at 279-80. In *Gibson v. Maloney*, 263 So. 2d 632 (Fla. 1st Dist.), *cert. denied*, 268 So. 2d 909 (Fla. 1972), the District Court of Appeal, First District, defined this standard:

The plaintiff must prove that the publication involved was deliberately falsified or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone [are] insufficient to satisfy this standard. . . . [E]ven ill will or intent to harm are not enough. There must be showing of an intent to harm "through falsehood."

*Id.* at 636-37.

Clear and convincing evidence of actual malice is the proper standard of proof in a libel action brought by a public official. *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Grad v. Copeland*, 280 So. 2d 461 (Fla. 4th Dist.), *cert. denied*, 287 So. 2d 682 (Fla. 1973); *Damron v. Ocala Star-Banner Co.*, 263 So. 2d 291 (Fla. 1st Dist. 1972); *Gibson v. Maloney*, 263 So. 2d 632 (Fla. 1st Dist.), *cert. denied*, 268 So. 2d 909 (Fla. 1972). In reviewing the sufficiency of the evidence in a libel action, the court will make a de novo determination. *Gibson v. Maloney*, 263 So. 2d 632 (Fla. 1st Dist.), *cert. denied*, 268 So. 2d 909 (Fla. 1972).

181. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). But see *Gertz v. Welch*, 94 S. Ct. 2997 (1974).

182. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

183. 271 So. 2d 745 (Fla. 1972), *quashing* 254 So. 2d 386 (Fla. 4th Dist. 1971), *modified*, 279 So. 2d 389 (Fla. 4th Dist. 1973) [hereinafter cited as *Firestone*].

define the ambits of the constitutional protection in state libel suits. Mary Alice Firestone, the former wife of the heir to the Firestone rubber fortune, sued Time magazine for allegedly defamatory statements published in connection with her divorce. In essence the article stated that plaintiff had been divorced by her wealthy husband on grounds of extreme cruelty and adultery.<sup>184</sup> The lower court awarded the plaintiff \$100,000 in damages and Time magazine appealed. The District Court of Appeal, Fourth District, reversed, holding that the Firestone divorce constituted an event of great public interest and, as such, fell under the *New York Times* privilege.<sup>185</sup> The Supreme Court of Florida, however, disagreed, ruling that although the Firestone divorce was unquestionably newsworthy, news reports concerning the same fell outside the purview of the constitutional protection given to "matters of real public or general concern."<sup>186</sup>

In determining what events will fall within the constitutional privilege, the court relied on the concept enunciated in *Rosenbloom v. Metro-media*,<sup>187</sup> stating that the determinative factor is whether the publication involves a question of "public or general concern," as opposed to public "interest." It left the delineation of the reach of that term to future decisions.<sup>188</sup> Thus, the court cautioned:

"[N]ewsworthiness" is that which is well calculated to generate

184. The challenged publication read as follows:

Divorced. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Firestone, 32, his third wife; a one time Palm Beach schoolteacher; on grounds of extreme cruelty and *adultery*; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extra-marital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."

*Id.* at 746 (emphasis in original).

185. In support of its conclusion, the court noted that the divorce trial had lasted seventeen months and that there had been a great deal of publicity connected with it. In addition, because of the social status of the parties and the "sensational, colorful" testimony at trial, there had been national news coverage. *Time, Inc. v. Firestone*, 254 So. 2d 386, 389 (Fla. 4th Dist. 1971).

186. *Firestone v. Time, Inc.*, 271 So. 2d 745, 752 (Fla. 1972).

187. 403 U.S. 29 (1971).

It is clear that there has emerged from our cases decided since *New York Times* the concept that the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a "public official," "public figure," or "private individual," as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest. . . . [T]he time has come forthrightly to announce that the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases.

*Id.* at 144-45 (emphasis deleted).

See *Gibson v. Maloney*, 263 So. 2d 632 (Fla. 1st Dist.), *cert. denied*, 268 So. 2d 909 (Fla. 1972), for a discussion of the expansion of the *New York Times* doctrine and its application to the publisher and editor of a local newspaper in Florida. In *Gibson*, the court found that by virtue of his publications, the defendant editor and publisher "made himself a public figure . . . and . . . became a part of the passing scene . . ." *Id.* at 635. See Beckham & Chopin, *Torts—Tenth Survey of Florida Law*, 26 U. MIAMI L. REV. 128, 142-43 (1971).

188. *Firestone v. Time, Inc.*, 271 So. 2d 745, 751 (Fla. 1972). The court stated that *Firestone* was one of those cases whose holdings would define the ambit of the term.

wide reader interest and thus may be a legitimate area of exploitation by the communications media. But we perceive a clear distinction between mere curiosity, or the undeniably prevalent morbid or prurient intrigue with scandal or with the potentially humorous misfortune of others, on the one hand, and *real public or general concern* on the other.<sup>189</sup>

Thus, while quoting with approval from *New York Times* and its progeny, the court felt that the line had to be drawn somewhere.<sup>190</sup> Therefore, the court ruled that regardless of the prominence of the defamed individual, there still remains a sector of his private life which is of no genuine concern to the public and deserves the highest protection.<sup>191</sup>

The court adopted the following test: In determining whether an event is constitutionally protected, the question is whether there is a "logical relationship" between the reported activities of the prominent person or the subject matter of the conduct, on the one hand, and the real concern of the public, on the other hand.<sup>192</sup> Thus, applying the test to the Firestone divorce, the court concluded that neither wealth, social position nor fame, render the private affairs of the parties involved open to "unbridled public scrutiny" under the guise of public concern.<sup>193</sup>

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189. *Id.* at 748 (emphasis in original).

Thus, . . . it can be broadly said that matters of real public or general concern are those which invoke common and predominant public activity, participation or indulgence, and cogitation, study and debate; and they include such matters as sporting events, the performing and fine arts, morality and religion, the sciences, and matters relating generally to the health, well-being and general comfort of the public as a whole. Accordingly, news items or featured articles or commentaries by communications media relating to these matters are and should be constitutionally protected notwithstanding that obscure or prominent individuals may be caught up in the current and regrettably defamed. That this is the law is again postulated in *Metromedia*.

*Id.* at 749 (footnotes omitted).

190. *Id.* at 751.

191. *Id.* at 750.

192. *Id.* The court categorized the question as one of law, as opposed to one of fact, since reasonable men cannot differ on what is or is not logical. The press need only exercise "responsible judgment" as to what is reasonable and "would exploit mere sensationalism at [its] own risk." *Id.* at 751.

193. To explain its conclusion, the court added:

That the public was curious, titillated or intrigued with the scandal in the Firestone divorce is beyond doubt. But we again emphasize the distinction we make between that genre of public interest and real public or general concern. Applying the suggested test, where in this case is the logical relationship between the marital difficulties of the Firestones and real public concern? The matter certainly doesn't inhere significantly within the areas of public concern we categorized earlier; and no category otherwise can be articulated except prurient curiosity, which we reject as too frivolous a predicate upon which to expend constitutional energies.

*Id.* at 752 (footnote omitted). The court nonetheless remanded the case to the district court because there could be other grounds on which a decision in favor of the plaintiff could be sustained under Florida libel laws. For example, the court noted that the publication could well fall within the ambit of the qualified privilege afforded reports of judicial proceedings. *Id.* at 752-53. Upon remand, the District Court of Appeal, Fourth District, declined to reconsider the case on any other ground previously argued. Rather, the court stated that it adhered to its previous decision in *Time, Inc. v. Firestone*, 254 So. 2d 386 (Fla. 4th Dist. 1971), wherein the constitutional privilege had been thoroughly discussed to the exclusion of the other points. Refusing to plunge into any discussion of any other point, the appellate

In line with *Firestone* is *Nigro v. Miami Herald Publishing Co.*<sup>194</sup> The defendant newspaper referred to plaintiffs as a group of alleged Mafia members who flew to Miami from Kansas City to meet with other top Mafia figures. The newspaper reported that the group received federal grand jury subpoenas upon arrival at the airport. The court cited to *Rosenbloom v. Metromedia, Inc.*<sup>195</sup> stating that in order to determine whether the first amendment applies to state libel actions, the touchstone is whether the contents of the publication concern an issue of public or general concern. In affirming summary judgment for the defendant newspaper, the court ruled that the disputed fact in *Nigro* fell within the test; the court reasoned that at the time of the alleged libelous publications, crime in the street was a key question in national, state and local political races. Additionally, the public was under the full impact of the nationwide concern over the control of organized crime.<sup>196</sup>

In another area of libel law, the District Court of Appeal, First District, departed from early Florida precedent when it held that communications between a credit bureau and one of its members are not conditionally privileged, but are actionable in libel.<sup>197</sup> In *Vinson v. Ford Motor Credit Co.*,<sup>198</sup> the defendant credit company advised the local credit bureau that the plaintiff's payment record was unsatisfactory and that it had repossessed his automobile. In fact, the plaintiff had arranged with the defendant for the "voluntary return" of the car because it had failed to run properly. The First District concluded: "Such callous disregard for the truth constitutes libel per se, especially when coupled with a gross failure to take any steps to correct the lies [the defendant] transmitted."<sup>199</sup>

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court merely re-affirmed its previous finding that the "[p]laintiff's proofs were insufficient under the doctrine of common law privilege for reports of judicial proceedings." *Time, Inc. v. Firestone*, 279 So. 2d 389, 394 (Fla. 4th Dist. 1973).

In this connection, see *Seidel v. Hill*, 264 So. 2d 81 (Fla. 4th Dist. 1972), where the court affirmed summary judgment for the defendant. In *Seidel*, a writing apparently made by a physician and published as a part of and in participation of quasi-judicial (workmen's compensation) proceedings was held to be absolutely privileged.

194. 262 So. 2d 698 (Fla. 3d Dist.), *cert. denied*, 267 So. 2d 834 (Fla. 1972) [hereinafter referred to as *Nigro*].

195. 403 U.S. 29 (1971).

196. *Nigro v. Miami Herald Publishing Co.*, 262 So. 2d 698, 700 (Fla. 3d Dist.), *cert. denied*, 267 So. 2d 834 (Fla. 1972).

197. *Vinson v. Ford Motor Credit Co.*, 259 So. 2d 768 (Fla. 1st Dist. 1972) [hereinafter referred to as *Vinson*]. See *Stockett v. Beneficial Finance Co.*, 269 So. 2d 735 (Fla. 3d Dist. 1972), where a letter sent by the defendant to the plaintiff's employer concerning a debt allegedly owed by the plaintiff was held not actionable as libel. The court noted that the conduct complained of (the defendant's collection practices) was not so offensive in nature. *Id.* at 736.

198. 259 So. 2d 768 (Fla. 1st Dist. 1972).

199. *Id.* at 770-71 (footnote omitted). According to the court, the crucial question was whether there is a distinction between "voluntary return" and "repossession" in the ordinary meaning of the terms. The court explained: "[R]epossession" results from a failure of the buyer to "keep up" his payments. By like token, a "voluntary return," coupled with a "voluntary acceptance by the seller," usually results from an agreement that no further liability exists on the buyer's part. *Id.* at 770.

On the other hand, "statements made by officials of all branches of government in connection with their official duties [are] absolutely privileged."<sup>200</sup> In *Roberts v. Lenfestey*,<sup>201</sup> the plaintiff was an applicant for a teaching position at the junior college of which the defendant was president. After several interviews with the defendant, the plaintiff wrote various letters for the purpose of pressuring the defendant to employ him. The letters were published in a local paper. In the course of a faculty meeting and in response to a question concerning these publications, the defendant attributed the letters to the plaintiff. Plaintiff claimed that the defendant made slanderous statements concerning him at the meeting. The court affirmed summary judgment for the defendant, ruling that the absolute privilege afforded the legislative and judicial branches of the government in connection with statements made in the performance of official duties extends to the executive branch as well. In addition, this absolute privilege is not restricted to those in high executive positions with the state or local governments.<sup>202</sup> The court reasoned that the defendant was the chief executive officer of a state junior college and was hired by the county school board. In addition, the statements were made during the course of a faculty meeting at the junior college and in response to questions concerning the prospective employment of the plaintiff.<sup>203</sup>

An oral communication is actionable per se—that is, without the need to show special damages—if the communication imputes to the slandered individual (a) a criminal offense amounting to a felony; or (b) a presently existing venereal or other loathsome and communicable disease, or (c) conduct or characteristics incompatible with the proper exercise of a lawful business, trade, profession or office; or (d) acts of unchastity, if the plaintiff is a woman.<sup>204</sup> In *Wolfson v. Kirk*,<sup>205</sup> the plain-

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200. *Roberts v. Lenfestey*, 264 So. 2d 449, 451 (Fla. 2d Dist. 1972), quoting from *Hauser v. Urchisin*, 231 So. 2d 6 (Fla. 1970).

201. 264 So. 2d 449 (Fla. 2d Dist. 1972).

202. *Id.* at 450. The court analogized the defendant's position to that of a county manager, the official post involved in the case of *McNayr v. Kelly*, 184 So. 2d 428 (Fla. 1966), wherein the Supreme Court of Florida extended the absolute privilege doctrine to the executive branch of the government. Likewise, in *Knight v. Starr*, 275 So. 2d 37 (Fla. 4th Dist. 1973), alleged statements made by a sheriff were held to be absolutely privileged. The defendant sheriff put the plaintiff under arrest and held him for approximately four hours. The plaintiff was released without charges. He claimed that the sheriff gave a tape recorded interview to certain TV stations in the area. The tape concerned the plaintiff's arrest. Therefore, the plaintiff alleged, the defendant knew that the statements made during the interview would be broadcast over radio and TV stations, causing the plaintiff injury and damage. Since the statements were absolutely privileged, the plaintiff failed to state a cause of action.

203. *Roberts v. Lenfestey*, 264 So. 2d 449, 450 (Fla. 2d Dist. 1972).

204. *Wolfson v. Kirk*, 273 So. 2d 774 (Fla. 4th Dist.), cert. denied, 279 So. 2d 32 (Fla. 1973), relying on *Campbell v. Jacksonville Kennel Club*, 66 So. 2d 495 (Fla. 1953). If the communication is actionable per se, the plaintiff need not plead or prove malice (except where a privilege is involved) or special damages. In such cases, both malice and the existence of damages will be presumed. The presumption is a presumption of law, rather than one of fact, and cannot be dispelled by the production of evidence. *Wolfson v. Kirk*, 273 So. 2d 774,



tiff, a businessman and business consultant, brought a slander action against the state governor. In the course of a campaign speech, the defendant allegedly stated that he knew the plaintiff when he (the defendant) was running a stock brokerage house and that "we invited [the plaintiff] out of the office."<sup>206</sup> The plaintiff claimed that the statement was untrue and that it imputed to him conduct and characteristics incompatible with the proper exercise of his lawful business. The District Court of Appeal, Fourth District, agreed with the plaintiff's contention and reversed the order granting the defendant's motion to dismiss. It was not unreasonable to infer that persons hearing the remark might have taken it to mean that the plaintiff was a person with whom it was undesirable to maintain business relations. As such, the remark possibly fell within one of the categories of slander which are actionable per se and it is for the trier of fact to decide whether or not the remark was understood in the defamatory sense.<sup>207</sup>

### E. Right of Privacy

In *Benson v. Florida Publishing Co.*,<sup>208</sup> the plaintiff minor was charged with the capital offense of rape. He sued the publishing company for money damages on grounds of invasion of his right of privacy. Florida's Child Molester Law<sup>209</sup> prohibits the publication of the names of any unmarried minor under the age of sixteen who is charged with a sex crime. The lower court chose to certify the following question to the Supreme Court of Florida: Whether the publication of the name of an unmarried minor below the age of sixteen in violation of the statute constitutionally gave rise to a cause of action for money damages for the invasion of the minor's privacy. The court answered the question in the negative on the grounds that the crime involved was the capital offense of rape; rape, however, is not one of the crimes covered by the Child Molester Law. Thus, since the statute is inapplicable to persons charged with capital offenses, the plaintiff was not entitled to its protection.<sup>210</sup>

777 (Fla. 4th Dist.), *cert. denied*, 279 So. 2d 32 (Fla. 1973). The authorities hold that the words will be construed in the sense in which they may be reasonably understood. Other cases speak in terms of the so-called "common mind rule," namely, that the words will be interpreted as the "common mind" would naturally have understood them. *Id.* at 777. In the interpretation of a slanderous statement, the court is not limited to the language used, but may consider extrinsic evidence to the extent that it may assist in giving meaning to the words used. In this sense, libel is different from slander. Florida cases hold that written defamation must be construed without reference to any other facts save the words themselves. This is the only meaningful distinction remaining between libel and slander. *Id.* at 778.

205. 273 So. 2d 774 (Fla. 4th Dist.), *cert. denied*, 279 So. 2d 32 (Fla. 1973).

206. *Id.* at 776.

207. *Id.* at 778-79.

208. 262 So. 2d 196 (Fla. 1972).

209. FLA. STAT. § 801.221 (1973).

210. In holding the statute inapplicable to the plaintiff, the court failed to reach the question of whether a plaintiff, charged with a crime covered by the statute, would be entitled to money damages for the invasion of his right of privacy.

For a case alleging a violation of the constitutional right of privacy, see *Yorty v. Stone*,

*F. Interference with the Contractual Relations of Others*

When the plaintiff's right under a contract is not an exclusive right, and when the plaintiff and the defendant are business competitors no interference with his contractual relationship may result.<sup>211</sup> In *International Expositions, Inc. v. City of Miami Beach*,<sup>212</sup> the plaintiff entered into a five-year contract with the City of Miami Beach to hold its yearly automobile shows in the city's convention hall. The agreement, however, did not give the plaintiff the exclusive right to stage automobile shows in the hall. The defendant, also in the automobile business, contracted with the city for the use of the convention hall to present its own automobile shows, in competition with the plaintiff. The plaintiff then sued the city for breach of contract and the defendant for the intentional destruction of its contractual relationship with the City of Miami Beach. The trial court dismissed the plaintiff's complaint. The District Court of Appeal, Third District, affirmed the order of dismissal, stating that: "[A]n interference with a non-exclusive right . . . is a privileged interference."<sup>213</sup> The court reasoned that the plaintiff could have bargained for an exclusive right to stage automobile shows at the hall when it negotiated with the city. However, since he failed to do so, the city was free to contract with others without breaching its agreement with the plaintiff. Therefore, the action of the defendant competitor in leasing the hall from the city to present its own shows was not a tortious interference with any contractual right of the plaintiff.

## IV. NUISANCES

A public nuisance is said to violate public rights by subverting the public order, decency or morals, or by causing inconvenience or damage to the public in general. The legislature is thus vested with a broad discretion in designating a particular activity as a public nuisance.<sup>214</sup> In *Orlando Sports Stadium, Inc. v. State ex rel. Powell*,<sup>215</sup> the state attorney and county solicitor sought to enjoin the operation of the defendant's stadium, where it was claimed that drugs and narcotics were being unlawfully used. Both the condition alleged to constitute a public nuisance and the authority to enjoin it were defined by statute. The defendants claimed that the statutes designating their property as a public nuisance violated due process because they failed to be sufficiently explicit in their

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259 So. 2d 146 (Fla. 1972) [hereinafter referred to as *Yorty*]. In *Yorty*, the plaintiff did not seek tort relief in money damages, but rather a writ of mandamus or prohibition to require public officials to remove his name from the list of candidates in Florida's presidential primary ballot. At any rate, the majority denied the relief sought on the ground that in such cases the public interest transcends the bounds of privacy.

211. *International Expo., Inc. v. City of Miami Beach*, 274 So. 2d 29 (Fla. 3d Dist. 1973).

212. *Id.*

213. *Id.* at 31.

214. *Orlando Sports Stadium, Inc., v. State ex rel. Powell*, 262 So. 2d 881 (Fla. 1972).

215. *Id.*

description of the conduct proscribed. The Supreme Court of Florida disagreed, stating that the state has authority to prevent or abate nuisances in the exercise of its police power for the purpose of protecting the lives, health, morals, comfort and general welfare. In response to the defendant's contention, the court observed that it is not possible to define or enumerate all nuisances comprehensively; each case must turn on its own facts and each must be judicially determined. The statutes in question, however, were not so vague and indefinite as to invade the defendant's constitutional rights of due process.<sup>216</sup>

In *Hardwick v. Metropolitan Dade County*,<sup>217</sup> a property owner sued the county, claiming that the maintenance of a public park adjacent to his property constituted a private nuisance or trespass. Although the court placed some restrictions on the activities that could be lawfully conducted at the park, it nonetheless declined to find that the park constituted a nuisance. However, the court agreed with the lower court that "balancing the equities between the parties"<sup>218</sup> was the proper course to follow. In so doing, the District Court of Appeal, Third District, affirmed the trial court's order, quoting from it in pertinent part:

[E]vidence discloses that literally thousands of children enjoy this recreational facility each year. The Court finds that the activities of or at the Suniland Park are causing discomfort to the Plaintiff. It appears, however, that such discomfort and inconvenience or loss by reduction of property value to the Plaintiff would be slight as compared with the loss of the use of the park to the youth of this County.

The Court finds that the activities of and at the Suniland Park are not of such a character or degree to be a taking of Plaintiff's property. Neither are they of such character as to be a public or a private nuisance. . . . It is evident that the Court must balance the equities among the parties.<sup>219</sup>

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216. The court cautioned, however, that the plaintiffs were not seeking to enjoin the overall operation of the Orlando Sports Stadium, but only a limited use thereof, namely, the unlawful use of drugs and narcotics on the premises.

In *Mitchem v. State ex rel. Schaub*, 250 So. 2d 883 (Fla. 1971), the state attorney sought to enjoin the operation of the defendant bookstore as a public nuisance. The bookstore was allegedly engaged in the sale of obscene and pornographic materials. The lower court found that the operation of the store constituted a public nuisance and granted the injunction. The Supreme Court of Florida, however, disagreed and held the injunction invalid: "A business involved in the dissemination of publications cannot be declared a nuisance in this manner." *Id.* at 886. The court added: "We reserve judgment, however, on the issue of whether a nuisance theory, in the proper circumstances, might be applicable to obscenity proceedings." *Id.* at 886-87.

217. 256 So. 2d 387 (Fla. 3d Dist. 1972).

218. *Id.* at 389.

219. *Id.* at 388. In *Buchanan v. Golden Hills Turf & Country Club*, 257 So. 2d 54 (Fla. 1st Dist. 1972), *modified*, 273 So. 2d 375 (Fla. 1973), the lower court had enjoined a feeder cattle operation in an area adjacent to a country club, school and residential area. Herds of cattle were kept in the property for fattening purposes prior to slaughtering. The District Court of Appeal, First District, agreed that the defendant could not use his property so as to create a nuisance to his neighbors, but held that the injunction was so broad that

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it amounted to a confiscation of the defendant's property. Therefore, the court remanded the case to the lower court for modification of the injunctive order. Conflict certiorari was subsequently granted. While disapproving of the First District's decision to the extent that the appellate court had made an independent judgment on the facts, the Supreme Court of Florida agreed that the case should be remanded for the purpose of taking further testimony in the lower court. The court felt that two factors warranted the remand order: (1) the span of time which had elapsed from the institution of the suit, coupled with (2) the possibility that conditions and possible remedies could have changed in the interim period.

In *Bowen v. Holloway*, 255 So. 2d 696 (Fla. 4th Dist. 1971), the plaintiff sustained personal injuries when the motorcycle he was riding collided with a horse which had strayed from the defendant's pasture. The court found that the existence of factual issues precluded the entry of summary judgment in favor of the pasture owners, stating:

[Plaintiff] contends that the defect or dangerous condition constituting the incipient nuisance was the absence of a fence on the street side of the stall area, a condition which existed at the time the property was rented to the [owner of the horse]. A factual issue is presented as to whether this is a defect in or a condition of the leased premises of such a nature that by the tenant's use of the property for the purposes and in the manner intended by the lease, such use will result in a nuisance.

*Id.* at 698.